BENGAL SECRETARIAT LIBRARY

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL XX.—1892-93.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND, 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C

1893.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

BENGAL SECRETARIAT LIBRARY.

LIST

OF THE]

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1893.

Viscount *Cranbrook*, Lord President.
The Lord Chancellor, Lord *Herschell*.
The Duke of *Richmond and Gordon*.
The Marquis of *Ripon*.
Earl of *Selborne*.
Earl *Spencer*.
Lord *Coleridge*.
Lord *Carlingford*.
Lord *Penzance*.
Lord *Aberdare*.
Lord *Blackburn*.
Lord *Watson*.
Lord *Halsbury*.
Lord *Hobhouse*.
Lord *Esher*.
Lord *Macnaghten*.
Lord *Morris*.
Lord *Field*.
Lord *Hannen*.
Lord *Shand*.
Sir *Richard Couch*.
Sir *Nathaniel Lindley*.
Sir *Charles Bowen*.
Sir *Edward Fry*.

And others ex-officio under the Appellate Jurisdiction Acts of 1876 (39 & 40 *Vict. c.* 59) *and* 1887 (50 & 51 *Vict. c.* 70).

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

Balgobind Dass *v.* Narain Lall . 116

Dakshina Mohun Roy Chowdhry *v.* Saroda Mohun Roy Chowdhry 160

Delhi and London Bank *v.* Oldham 139

Ghasiti (under Guardianship) and Nanhi Jan *v.* Umrao Jan. Ghasiti (under Guardianship) and Nanhi Jan *v.* Jaggu and Sannu 193

Hurrinath Chatterji *v.* Mohunt Mothoor Mohun Goswami . 183

Ismail Ariff *v.* Mahomed Ghouse 99

Kunwar Ram Lal *v.* Nil Kanth . 112

Macrea, Ex parte 90

Mahomed Abdool Hai *v.* Gujraj Sahai 70

PAGE

Mahomed Riasat Ali *v.* Mussumat Hasin Banu 155

Mohesh Narain Moonshi *v.* Taruck Nath Moitra 30

Narindar Bahadur Singh *v.* Achal Ram 77

Prince Mirza Suleman Kadr *v.* Nawab Mehdi Begam Surreya Bahu 144

Rahimbhoy Habibbhoy *v.* Turner 1

Rajah Gobind Lal Roy *v.* Ramjanam Misser 165

Rajah Mokham Singh *v.* Rajah Rup Singh 127

Rajah Nilmoni Singh *v.* Kirti Chunder Chowdhry . . 95

Raja Surja Kant Acharya *v.* Rani Hemanta Kumari Dubi . . 25

Ramalingam Pillai *v.* Vythilingam Pillai 150

	PAGE
Sarju Parshad *v.* Bir Bhaddar Sewak Panday . . .	108
Secretary of State for India in Council *v.* Shanmugaraya Mudaliar	80
Shekh Sultan Sani *v.* Shekh Ajmodin	50
Sowdaminee Dossee *v.* Administrator-General of Bengal .	12
Sri Sri Sri Lakshmi Narayana Ananga Garu *v.* Sri Madhawa Deo Garu	9
Syed Ashgar Reza *v.* Syed Medhi Hossein Khan . . .	38
Tassaduk Rasul Khan *v.* Ahmad Husain	176

TABLE OF CASES CITED.

A.

		PAGE
Ameeroonnissa Khatoon *v.* Abedoonnissa Khatoon	Law Rep. 2 Ind. Ap. 87	40
Appasami Odayar *v.* Subramanya Odayar	Law Rep. 15 Ind. Ap. 167	32, 38
Appovier's Case	11 Moore's Ind. Ap. 75	118
Arunachellam Chetti (T. R.) *v.* V. R. Arunachellam Chetti	Law Rep. 15 Ind. Ap. 171	179, 182
Ashrufood Dowla Ahmed Hossein Khan *v.* Hyder Hossein Khan	11 Moore's Ind. Ap. 94	54
Aumirtolall Bose *v.* Rajonecekant Mitter	Law Rep. 2 Ind. Ap. 121	192

B.

Baijnath Sahu *v.* Lala Sital Prasad	2 Beng. L. R. F. B. 1	168, 169
Bakshi Nand Kishore *v.* Malak Chand	Ind. L. R. 7 Allah. 289	179
Bal Mokoond Lall *v.* Jirjudhun Roy	Ind. L. R. 9 Calc 271	169
Barnes *v.* Addy	Law Rep. 9 Ch. 244*.	3
Basdeo *v.* Gopal	Ind. L. R. 8 Allah. 644	32
Bhugwandeen Doobey *v.* Myna Baee	11 Moore's Ind. Ap. 487	120
Bindu Kuar *v.* Bonda Das	Ind. L. R. 7 Allah. 660	161
Birj Mohun Thakoor *v.* Bai Uma Nath Chowdhry	Law Rep. 19 Ind. Ap. 154	179
Bowes *v.* Heaps	3 V. & B. 117	132
Bunwaree Lall Sahoo *v.* Mohabeer Proshad Singh	Law Rep. 1 Ind. Ap. 89	168

C.

Cassidy, In re	4 Bomb. H. C. Cr. 17.	93
Chamaili Kuar *v.* Ramprasad	Ind. L. R. 2 Allah. 267	118, 120, 124
Chunder Coomar *v.* Hurbans Sahai	Ind. L. R. 16 Calc. 137	119

D.

Deendyal Lal *v.* Jugdeep Narain Singh.	Law Rep. 4 Ind. Ap. 247	118
Dhurm Das Pandey *v.* Shama Soondri Debiah	3 Moore's Ind. Ap. 229	39
Dillet, In re	12 App. Cas. 459	93
Dosibhai *v.* Ishwardas Jagjiwandas	Law. Rep. 18 Ind. Ap. 22	54

E.

Eagleton's Case	Dearsley, 538	93

F.

		PAGE
Fisher *v.* Kamala Naicker . .	8 Moore's Ind. Ap. 187 .	135

G.

Ganraj Dubey *v.* Sheozore Singh .	Ind. L. R. 2 Allah. 898 .	118
Gonda Kooer *v.* Kooer Oodey Singh .	14 Beng. L. R. 159 . .	17
Gopalchunder Chuckerbutty *v.* Woodoy-lall Dey	10 Suth. W. R. 115 . .	161
Gopee Krist Gosain *v.* Gungapersaud Gosain	6 Moore's Ind. Ap. 53 .	39
Grose *v.* Amirtomayi Dossee . .	4 Beng. L. R. O. C. 1. .	14
Gujju Lal *v.* Fettehdal . . .	Ind. L. R. 6 Calc. 171 .	54
Gulabdas *v.* Collector of Surat . .	Law Rep. 6 Ind. Ap. 54 .	54
Gungar Parshad Sahu *v.* Maharani Bibi.	Law Rep. 12 Ind. Ap. 47 .	135

I.

Imambandi Begum *v.* Kumbeswari Pershad	Law Rep. 13 Ind. Ap. 165 .	39
Isri Dutt Koer *v.* Hansbutti Koerrain .	Law Rep. 10 Ind. Ap. 150	13, 14, 15, 17

J.

Jagadamba Chowdhrani *v.* Dakhina Mohun	Law Rep. 13 Ind. Ap. 84	31, 32, 35, 161
Jasoda *v.* Mathura Das. . .	Ind. L. R. 9 Allah. 511 .	179
Jeebun Munder *v.* Taramonee Koomaree	6 Suth. W. R. Act X. 99 .	26
Jugol Kishore *v.* Jotindro Mohun Tagore	Law Rep. 11 Ind. Ap. 66 .	186

L.

Lakshman Dada Naik *v.* Ramchandra Dada Naik	Law Rep. 7 Ind. Ap. 195	120, 124
Lala Gowri Sunker Lal *v.* Janki Pershad	Law Rep. 17 Ind. Ap. 57	169, 171
Lala Mobaruk Lal *v.* Secretary of State for India in Council . . .	Ind. L. R. 11 Calc. 200	167, 168

M.

Macleod *v.* Attorney-General for New South Wales. . . .	[1891] A. C. 455 . .	93
Madhavrar Manohar *v.* Atmaram Kashar	Ind. L. R. 15 Bomb. 519 .	54
Madho Parshad *v.* Mehrban Singh .	Law Rep. 17 Ind. Ap. 194	118, 119, 120, 125
Mahabeer Persad *v.* Ramyad Singh .	12 Beng. L. R. 90 . .	118
Mathura Naikin *v.* Esu Naikin .	Ind. L. R. 4 Bomb. 545	197, 202
Mohabeer Pershad Singh *v.* Collector of Tirhoot	15 Suth. W. R. 137 . .	168
Mohunt Megh Lall Pooree *v.* Shib Pershad Madi	Ind. L. R. 7 Calc. 34 . .	179
Moulvie Sayyud Uzhur Ali *v.* Bebee Ultaf Fatima	13 Moore's Ind. Ap. 232 .	39

		PAGE
Mulkah Do Alum Nowab Jujdar Bohoo v. Mirza Jehan Kudr	11 Moore's Ind. Ap. 252	145
Mussumat Bhagabutti Daee v. Chowdhry Bholanath Thakoor	Law Rep. 2 Ind. Ap. 260	15
Mussumat Phoolbas Koonwur v. Lalla Jogeshur Roy	Law Rep. 3 Ind. Ap. 7	118

N.

Naranji Bhikhabhai v. Dipa Umed	Ind. L. R. 3 Bomb. 3	54
Nawab Amjad Ali Khan v. Mohumdee Begum	11 Moore's Ind. Ap. 517	40
Nawab Muhammad Azmut Ali Khan v. Lalli Begum.	Law Rep. 9 Ind. Ap. 8	54
Nobin Chunder Chuckerbutty v. Guru Pershad Das.	Beng. L. R. F. B. 1008	185, 187, 188, 191

O.

Olpherts v. Mahabir Pershad Singh	Law Rep. 10 Ind. Ap. 25	179, 182

P.

Penny v. Penny	Law Rep. 5 Eq. 227	83
Pertab Narain Singh v. Triloki Nath Singh	Law Rep. 11 Ind. Ap. 197	185, 189
Peruvian Guano Company v. Dreyfus	[1892] A. C. 166	163
Petre v. Petre	1 Drew. 397	3
Premshunkar Raghunathji v. Government of Bombay	8 Bomb. H. C. R. 195	54

Q.

Queen Empress v. Dhundi	Ind. L. R. 8 Allah. 304	93
——————— v. Riasut Ali	Ind. L. R. 7 Calc. 352	93

R.

Rajah Muttu Ramalinga Setupati v. Perianayagam Pillai	Law Rep. 1 Ind. Ap. 209	152
Rajah of Pittapur v. Sri Rajah Venkata Mahipati Surya	Law Rep. 12 Ind. Ap. 119	158
Rajah Rup Singh v. Rani Baisni and the Collector	Law Rep. 11 Ind. Ap. 149	129, 136
Rajah Sahib Perhlad Sein v. Baboo Budhoo Singh	12 Moore's Ind. Ap. 310	130
Raj Bahadoor Singh v. Achumbit Lal	Law Rep. 6 Ind. Ap. 110	31
Ramanand Singh v. Gobind Singh	Ind. L. R. 5 Allah. 384	118, 120
Ramchandra Mantri v. Venkatrao Mantri	Ind. L. R. 6 Bomb. 598	54
Ramcoomar Coondoo v. Chunder Canto Mookerjee	Law Rep. 4 Ind. Ap. 47	127, 135, 136
Ram Kannye Gossamee v. Meernomoyee Dosse	2 Suth. W. R. 49	26

		PAGE
Ranee Khujoormonissa *v.* Roushun Jehan	Law Rep. 3 Ind. Ap. 291	39
Rangasami *v.* Krishnayyan	Ind. L. R. 14 Mad. 408	119
Rani Sartaj Kuari *v.* Rani Desraj Kuari.	Law Rep. 15 Ind. Ap. 97	135
Rash Behari Mukerji *v.* Pitambori Chowdhrani	Ind. L. R. 15 Calc. 237	71
Reg. *v.* Bertrand	4 Moore's P. C. (N.S.) 474	33
—— *v.* Cheeseman	Leigh & Cave, 459	93
Rukhinee Bullubh *v.* Brojonath Sircar	Ind. L. R. 5 Calc. 308	180
Rungama *v.* Atchama	4 Moore's Ind. Ap. 1	30, 33

S.

Sadabart Prasad Sahu *v.* Foolbash Koer	3 Beng. L. R. F. B. 31	118, 119, 120
Sadhusaran Singh *v.* Panchdeo Lal	Ind. L. R. 14 Calc. 1	71
Saroda Soondari Dasi *v.* Doyamoyi Dasi.	Ind. L. R. 5 Calc. 938	184, 189
Sheikh Bahauder Ali *v.* Sheikh Dhoman	1 Sel. Rep. 250	39
Sheolochun Singh *v.* Sahib Singh	Law Rep. 14 Ind. Ap. 63	13, 17
Sheo Prasad *v.* Hira Lal	Ind. L. R. 12 Allah. 440	179
Shivagunga Case	9 Moore's Ind. Ap. 539	185, 186, 188, 191, 192
Soorjeemoney Dossee *v.* Denobundoo Mullick	9 Moore's Ind. Ap. 123	13, 14, 18
Sreemunt Lall Ghose *v.* Shama Soondaree Dossee	12 Suth. W. R. 276	169
Sreemutty Rabutty Dossee *v.* Sibchunder Mullick	6 Moo. Ind. Ap. 1	14, 17
Srinath Kur *v.* Prosunno Kumar Ghose.	Ind. L. R. 9 Calc. 934	184, 187, 188
Suraj Bunsi Koer *v.* Sheo Prosad Singh.	Law Rep. 6 Ind. Ap. 88	118

T.

Thakoor Churn Roy *v.* Collector of 24-Pergunnahs	13 Suth. W. R. 336	169
Tiluck Chand *v.* Soudamini Dasi	Ind. L. R. 4 Calc. 566	161
Tripura Sundari *v.* Durga Churn Pal	Ind. L. R. 11 Calc. 74	179

U.

Udaram Sitaram *v.* Ranu Panderji	11 Bomb. H. C. R. 76.	120
Uddoy Aditya Deb *v.* Jadublal Aditya Deb	Ind. L. R. 5 Calc. 113	135

V.

Vasudev Bhat *v.* Venkatesh Sanbhav	10 Bomb. H. C. R. 139	120

BY ORDER OF THE GOVERNMENT OF BENGAL * FOR WARDED

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

BENGAL SECRETARIAT * LIBRARY.

RAHIMBHOY HUBIBBHOY . . . . . DEFENDANT;

AND

TURNER . . . . . PLAINTIFF.

J. C.*
1892
Nov. 9, 10.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Limitation—Act XV. of 1877, *sect.* 18—*Knowledge of Fraud, how proved—Onus probandi.*

It being proved that the Defendant had, twenty years before suit, combined with an insolvent and others to conceal the property of the insolvent, with a view of defrauding his creditors, and in pursuance of the fraud had become possessed of assets belonging to the insolvent estate:—

Held, in a suit by the official assignee to recover the same, that in order to bar the suit the *onus* was on the Defendant to shew the Plaintiff's clear and definite knowledge of the facts constituting the fraud at a date beyond the statutable period.

Such *onus* is not discharged by shewing that some hints and clues had reached the Plaintiff which might have led to such knowledge, the Defendant being all the while in possession of the insolvent's books and preventing the Plaintiff from seeing accounts which he desired to see.

A decree of the first Court directing a general account of the dealings between the Defendant and the insolvent after the date of the insolvency affirmed without the variations subsequently made.

APPEAL from a decree of the High Court (March 17, 1890), affirming with some variations a decree of Mr. Justice *Scott* (December 10, 1888).

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1892
RAHIMBHOY HUBIBBHOY v. TURNER.

The litigation out of which the appeal arose related to the insolvency of *Alladinbhoy Hubibbhoy*, who was one of the sons of *Hubibbhoy Ebrahim*, a Mahomedan merchant of *Bombay*, who died in the year 1865, leaving him surviving three sons, named respectively *Ahmedbhoy Hubibbhoy*, *Alladinbhoy Hubibbhoy*, and the Appellant, *Rahimbhoy Hubibbhoy*.

The facts are stated in the judgment of their Lordships.

The suit was brought by the official assignee against *Rahimbhoy Hubibbhoy* for the recovery of the property of his insolvent brother, which was alleged to have been privately transferred to him in fraud of the creditors under the insolvency. The plaint charged the Defendant with the fraudulent possession of six classes of property belonging to the insolvent. Mr. Justice *Scott* rejected the claim as to three classes, but directed an account as to the remainder. On appeal, the High Court decided against the official assignee as to one of the three classes so allowed, and as to the other two directed the accounts to be taken on a footing more favourable to the Plaintiff. No appeal was preferred by the official assignee, and accordingly the appeal was limited to two classes of property, viz., the *China* property, and the *Elphinstone* shares.

There were concurrent findings of fact on the material questions at issue. As regards the *Statute of Limitations*, both Courts assumed that the period would be three years from the time the official assignee was entitled to sue, viz., from the adjudication of insolvency in January, 1867. But they both found that his rights were saved by sect. 18 of the *Limitation Act*, which extends the period when the Plaintiff has, by means of fraud, been kept from the knowledge of such right or title, or where any document necessary to establish such right has been fraudulently concealed from him. They held that the fraudulent concealment continued till an inspection of the Defendant's books was extorted from him in December, 1885.

The judgment of the High Court upon this point was to this effect. As to the *China* property, they say:—

"If it was a transaction of the nature we have ascribed to it, there was from the very commencement concealed fraud, and that is (as explained by Vice-Chancellor *Kindersley*, in *Petre* v.

Petre (1), in discussing the 26th section of the English *Statute of Limitations*, 3 & 4 Will. 4, c. 27) designed fraud, by which a party knowing to whom the right belongs conceals the circumstances giving that right, *i.e.*, the title to the right to sue according to the language of sect. 18 of Act XV. of 1877, until the official assignee obtained inspection of the *China* books in December, 1885."

As to the *Elphinstone* shares, the same Court says :—

"There has been a fraudulent concealment of the insolvent's interest in the shares, or their proceeds, by the Defendant from the official assignee, since the commencement of the insolvency, which brings the case under sect. 18 of the Act, a conclusion which derives corroboration, as regards the Defendant himself, from the circumstance that he refused, as he admits he did, after the award between himself and *Ahmedbhoy* in 1870, under which he obtained the *China* books, to shew them to the official assignee until compelled by the Court to do so in 1885."

Cohen, Q.C., and *Branson*, for the Appellant, contended that the Courts were right in applying the three years' rule of limitation; but wrong in holding that the Respondent had, by means of the Appellant's fraud, been kept from the knowledge of his right to sue. Sect. 18 of Act XV. of 1877 accordingly did not save the suit. If the Plaintiff did not know all along the circumstances now relied upon, he had at least the means of knowledge, and might, with little inquiry, have ascertained all the material facts. Reference was made to *Barnes* v. *Addy* (2). Further, they referred to sects. 13 and 43 of the Civil Procedure Code, and contended that a former suit against the insolvent to which the Appellant was made a party might and ought to have included the relief sought in this, and that therefore the present suit was barred.

Finlay, Q.C., and *Mayne* (*Rigby*, Q.C., with them), for the Respondent, were heard as to the mode directed by the High Court of taking the accounts.

Cohen, Q.C., replied.

(1) 1 Drew. 397.

(2) Law Rep. 9 Ch. 244.

J. C. 1892

RAHIMBHOY HUBIBBHOY v. TURNER.

1892. Nov. 10. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This suit is brought by the assignee of *Alladinbhoy*, who became insolvent in the year 1867, against the Appellant, to recover assets alleged to belong to the insolvent's estate, of which the Appellant had wrongfully become possessed.

The dispute is now narrowed down to two items, one being what is called the *China* assets, and the other certain shares in a joint stock company called the *Elphinstone Land Company*.

There is no need to make a long story about the facts, of which very few are in dispute. The only peculiarity in the case is the length of time that elapsed between the insolvency and the bringing of the action.

Their Lordships entirely accept the view which both the Courts below have taken, that the insolvent, his son, and his two brothers, *Ahmedbhoy* and the present Appellant *Rahimbhoy*, combined together to conceal the property of the insolvent with the view of defrauding his creditors.

The first item which is in dispute, namely, the *China* assets, is of the following kind. The insolvent had a business at *Hong Kong*, and his brothers *Ahmedbhoy* and *Rahimbhoy*, also carried on business at the same place in partnership. By the middle of 1866 the insolvent was in very embarrassed circumstances. In September, 1866, he absconded so as to conceal himself from his creditors. His petition in insolvency was presented on the 17th of December, 1866, and he was adjudicated insolvent on the 7th of January, 1867. Pending these transactions, that is to say on the 1st of January, 1867, between the date of the petition and the date of the adjudication, the whole of the insolvent's assets at *Hong Kong* were handed over by his manager to the firm of his brothers *Ahmedbhoy* and *Rahimbhoy*, and his books were also handed over.

It is not disputed that the transfer was a voluntary one, that it cannot be maintained, and that if this action had been brought in 1867 the assets must have been recovered. But it is said that as the action was not brought till 1887, it is barred by time.

The answer is that the transfer was not only a voluntary one and bad against the creditors, but that it was committed in pursuance of a fraud, and was concealed from the creditors, that it was a fraud which prevented the assignee from having knowledge of his right to recover the assets, and therefore falls within the 18th section of the *Limitation Act* XV. of 1877, which directs that in such a case the time for instituting an action shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

The assignee is positive that he did not know anything about this fraud until the year 1885, when he learnt it in the course of a suit brought against *Ahmedbhoy* to recover a number of other items, in conjunction with this one, belonging to the insolvent's estate.

Their Lordships consider that when a man has committed a fraud and has got property thereby, it is for him to shew that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit. That is attempted in the present case. But their Lordships consider, and in this they agree with both the Courts below, that all that the Appellant *Rahimbhoy* has done is to shew that some clues and hints reached the assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the assignee that the insolvent's estate had been defrauded by *Rahimbhoy* of these assets in the year 1867.

Reference is made to a letter, shewing the transfer of the assets at that time, to an affidavit of documents which in themselves contain hints as to the conduct of the parties, and to certain memoranda called "the stitched book," which was kept by a treacherous servant of *Ahmedbhoy*, which again give hints and clues which might have led to knowledge. But all this while the Appellant was doing what he could to keep back the books of the insolvent firm which he had got into his hands, and to prevent the assignee from seeing accounts which he desired to see. Their Lordships cannot consider that this is such

J. C. 1892

RAHIMBHOY HUBIBBHOY v. TURNER.

knowledge on the part of the assignee as would deprive him of the benefit of the 18th section of the *Limitation Act*. They therefore consider that the action is brought in good time, being brought within two years after the real knowledge came to the mind of the assignee.

Then it is said that the suit against *Ahmedbhoy* is itself a bar to the present suit, because *Rahimbhoy* was made a party to it. There seems to have been a very irregular proceeding in that suit. *Rahimbhoy* was made a party, expressly, as the order termed it, for the purpose of discovery only, but he was not treated as a party. There was no decree against him; he was dispensed from attendance unless and until the Plaintiff gave him notice; and the Court has never made any order about his costs.

Their Lordships consider that the Courts below took a right view when they held that *Rahimbhoy* must not be considered a party to that suit, so as to be bound or protected by a decree made in it.

It is further urged that this item has in fact been recovered from *Ahmedbhoy*. It should have been mentioned that *Ahmedbhoy* and *Rahimbhoy* dissolved partnership in the year 1871, and they have since that time been severed in interest. No doubt there was the suit against *Ahmedbhoy*, which has been already mentioned, and the item was claimed against him in that suit. But the suit resulted in a reference to an arbitrator, and it was agreed between the parties, when they came before the arbitrator, that this particular item should not be pressed. It was in effect withdrawn from the arbitrator, and as the decree only follows the arbitrator's award, that item must be considered as excluded from the suit.

Their Lordships consider that there is nothing now to prevent the assignee making his claim against the Appellant *Rahimbhoy*, who is the other party to the fraud.

An objection was made by counsel for *Rahimbhoy* to a variation of the decree made by the first Court. The first Court directed a general account of the dealings between *Rahimbhoy's* firm and the insolvent. The Appellate Court limited that account, by directing that it should only commence with the assets received

after the date of the insolvency. Their Lordships consider that the Appellate Court have gone upon a right principle, and they decline to vary the decree in that respect.

The remaining item is that which has reference to the *Elphinstone* shares. As regards the question of fraud this item stands in precisely the same position as that which relates to the *China* assets, and their Lordships come to the same conclusion upon it.

The Appellant, however, complains of a variation made in the decree of the first Court by the Appellate Court, by which it is directed that in taking an account of these shares two sums for which credit is claimed by the Appellant shall be disallowed to him. The matter stands in this way. The shares belonged to *Alladinbhoy*. He mortgaged them to the *Imperial Bank of Bombay*. On the 15th of May, 1866, the firm of *Ahmedbhoy* and *Rahimbhoy* paid off the sum then due upon the mortgage of the shares, namely, Rs.68,838:4, and they subsequently paid a call upon the shares of Rs.22,785:8. When the reference was before the arbitrator in the suit against *Ahmedbhoy*, *Ahmedbhoy* claimed to be allowed those two sums. The Appellate Court thought that inasmuch as that matter was before the arbitrator it must be taken as certain that he allowed those two sums, or allowed value for them, and made his award against *Ahmedbhoy* upon that footing. It does not seem to their Lordships that this is by any means certain. It appears that there was an agreement made between *Ahmedbhoy* and *Rahimbhoy* in the year 1871, by which a sum of Rs.1,17520, which, under a previous award belonged to *Rahimbhoy*, was transferred by him to *Ahmedbhoy* and became *Ahmedbhoy's* property. There were several other items surrendered by *Rahimbhoy* to *Ahmedbhoy*, and *Rahimbhoy* took all the residue of the property of the partnership. That was the effect of the agreement of 1871. The Appellate Court have considered that the two sums of Rs.68,838:4 and Rs.22,785:8, claimed in the reference in *Ahmedbhoy's* suit were portion of the Rs.1,17520 which was assigned by *Rahimbhoy* to *Ahmedbhoy*, and they have directed that so far as those sums form a portion of the Rs.1,17520 they shall be disallowed in taking the account.

J. C. 1892 RAHIMBHOY HUBIBBHOY v. TURNER.

Their Lordships are not at all prepared to say that it may not turn out as the Appellate Court anticipate; but they do not consider that there is evidence enough before them to warrant them in assuming any such thing. It may be that there is no identity between the two sums. It may be that the arbitrator, finding that the two sums were a charge upon certain shares which were not embraced in the suit against *Ahmedbhoy*, threw out the whole matter. Their Lordships cannot tell what circumstances may be brought out in the inquiry. Upon the general account directed by the first Court, the whole facts will be ascertained; and then it will be competent for the Court to make a decree to meet the exact justice of the case.

Their Lordships think it therefore more prudent at the present stage of the case to make no direction as to those sums. What they say now is not intended to prejudice the question in any way. They merely think that it is right to suspend the judgment until the facts are accurately ascertained.

It should be observed that this matter is not mentioned in the pleadings. If it were the case that the two sums were taken into account by the arbitrator, and the shares thereby liberated from the charge, it would have been more natural to have disclosed that fact in the pleadings, in order that it might be sifted and elucidated in the course of the evidence and the hearing. But that has not been done, and therefore there is a certain amount of obscurity and darkness hanging over the point, which makes their Lordships desirous that the account should be taken in the general form settled by the first Court.

The result is that the decree of the Appellate Court will be varied, by omitting therefrom the direction that the Defendant is not to be allowed credit for the sums of Rs.68,838:4 and Rs.22,785:8 so far as the said two sums are included in the sum of Rs.1,17520, and affirmed in all other respects.

With regard to the costs of the appeal, their Lordships think that the variation now made ought to make no difference. Though it may prove to be a point of importance, the appeal was presented, not on this ground, but on the much broader and more vital grounds which have been dealt with and decided adversely to the Appellant.

Their Lordships think, therefore, that substantially this appeal has failed, and that the Appellant must bear the costs.

J. C. 1892 RAHIMBHOY HUBIBBHOY v. TURNER.

Solicitors for Appellant: *Lattey & Hart.*
Solicitors for Respondent: *Payne & Lattey.*

SRI SRI SRI LAKSHMI NARAYANA ANANGA GARU . . . . . } DEFENDANT;

AND

SRI MADHAWA DEO GARU . . . . PLAINTIFF.

J. C.* 1892 *Nov.* 25.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Construction—Agreement of Compromise—Maintenance of yourself, &c., and the rest of your Family.

Where the holder of an impartible raj compromised family disputes by agreeing with the eldest son of his younger brother to give "you every month Rs.300 on account of the maintenance of yourself, your younger brothers, three in all, and the rest of your family":—

Held, in a suit by the son of the youngest of the three brothers against the son of the rajah, that such payment was not limited to the life of any one brother or of all three, but that the "rest of your family" included the issue of the three brothers, and that a decree in the Plaintiff's favour for maintenance was right.

APPEAL from a decree of the High Court (March 28, 1890), reversing a decree of the District Court of *Ganjam* (Nov. 28, 1887).

The suit was by the Respondent, minor son of *Kamala Lochana*, to recover Rs.4180 arrears of maintenance at Rs.190 a month, and for future maintenance at Rs.230 a month.

Pitambara Deo, father of the Appellant, and uncle of *Kamala Lochana*, on the 9th of March, 1835, executed the agreement which is recited in the judgment of their Lordships.

Reductions were made in the amount of maintenance paid thereunder as deaths occurred in the family entitled. On the 9th of May, 1885, *Kamala Lochana* died, and from that date no further payments were made by the zemindar.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, SIR RICHARD COUCH, and SIR EDWARD FRY.

J. C.
1892
SRI SRI SRI LAKSHMI NARAYANA ANANGA GARU v. SRI MADHAWA DEO GARU.

The District Judge decreed in favour of the Plaintiff for Rs.760 arrears due to *Kamala Lochana* at his death, and dismissed the rest of the claim. He held that the agreement only applied in favour of the persons expressly referred to in it, and not to their descendants. The High Court not merely decreed in favour of arrears, but awarded maintenance to the Plaintiff at the rate of Rs.73 per mensem. It said: "We see no reason to think that the provision for maintenance was intended only for the benefit of the members then alive. The objection that the arrangement was intended to have a limited operation was not taken in the written statement. On the other hand, the zemindar admitted that the Appellant's mother and sister were entitled to sue for their maintenance, and objected to the Appellant's claim for the sole reason that he was not the legitimate son of *Kamala Lochana*." This issue of illegitimacy was found against the Appellant by both Courts.

Mayne, and *G. P. Johnstone*, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Defendant and Appellant is the zemindar of *Pedda Kimidy*, an impartible raj. The Plaintiff belongs to a branch of the same family, and the sole question is, whether the Plaintiff is entitled to be paid out of the revenues of the zemindary the amount of a charge created by an agreement made between the Defendant's father, *Pitambara Deo*, who was then zemindar of *Pedda Kimidy*, and *Jogi Deo*, the eldest son of *Pitambara's* younger brother, and the uncle of the Plaintiff. According to the agreement there seem to have been disputes between the elder and younger branches of the family, and the agreement is in the following terms:—*Pitambara* agrees "To give (you)"—that is, *Jogi Deo*—"presently Rs.10,000 (ten thousand) so that neither you nor your younger brothers nor the members of your family may make any demand in future in respect of the household articles, jewels, &c., or anything, or in respect of the debts

incurred by your deceased father, *Parasurama Deo Garu.*" Their Lordships do not know the meaning of the expression "the debts incurred by your deceased father." Whether "incurred" is a wrong word used in the translation, or whether the deceased father may have incurred debts in such circumstances as would give a claim against the estate of the elder brother, their Lordships cannot tell; but it is quite clear that there were substantial disputes respecting a substantial matter.

The next paragraph of the agreement is as follows: "To give (you) through the collector every month Rs.300 on account of the maintenance of yourself, your younger brothers three in all, and the rest of your family. As we hereby agreed that you, your younger brothers, and the other members of the family shall have no concern whatever henceforward in the said zemindary or any other thing, you should enjoy the said towji"—that is allowance. *Jogi Deo* and his two younger brothers are now dead, and the Plaintiff is the son of the youngest of them, apparently the only issue of the three. It is contended on behalf of the Defendant that the payment of Rs.300 a month was only to endure for the life of *Jogi Deo*, or at the most for the lives of the three brothers. It is immaterial which of those constructions is put forward. Either of them seems to their Lordships to be directly at variance with the terms of the agreement. It cannot be reasonably suggested who is to be included in the expression "the rest of your family," unless the issue of the three brothers are to be included. It seems clear to their Lordships that the Respondent, as the issue of one of the brothers, is to be so included, and that is the view taken by the High Court whose judgment is now appealed from. With respect to the amount of the maintenance, it seems to have been altered from time to time, but no question is now brought before their Lordships in regard to the exact amount which has been decreed by the High Court. Their Lordships see no reason for interfering with the decree of the High Court, and they will humbly advise Her Majesty to dismiss the appeal.

Solicitor for Appellant: *R. T. Tasker.*

J. C.* 1892 Dec. 2, 16.

SOWDAMINEE DOSSEE . . . . . APPELLANT;

AND

THE ADMINISTRATOR-GENERAL OF BENGAL AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Widow—Accumulations—Agreement between Widow and Reversionary Heir.

Where a sonless Hindu widow received from the executor of her husband's will a fund representing the accumulated income of his estate for eight years after his death, and undisposed of by the will, claiming the same as her absolute property, and the executor, who was also reversionary heir to the deceased, assented to her so receiving it, and admitted her absolute interest:—

Held, that the fund passed to the Respondent under a deed of trust in his favour executed by the widow.

APPEAL from a decree of the High Court (March 18, 1889), dismissing an appeal from a decree of *Trevelyan*, J. (Sept. 5, 1888), made in three suits relating to the same matters which had been heard together.

Concurrent findings of fact having disposed of the litigation so far as it related to the testamentary capacity of *Badam Coomaree*, the testatrix in the cause, the only question in this appeal was whether according to Hindu law *Badam Coomaree*, the mother of the Appellant, had power to alienate by deed and will the two amounts in dispute Rs.2,69,500 and Rs.10,600, or whether those sums constituted a portion of the estate of her deceased husband *Nobo Coomar Mullick*, and at her death descended to his reversionary heirs.

The facts of the case are stated in the judgment of their Lordships.

The law with regard to the accumulations by a Hindu widow is treated by *Trevelyan*, J., in his judgment on the settlement of issues, as follows:—

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, and SIR RICHARD COUCH.

"It is contended that the cases establish the following propositions:—

"In the first place, that a widow may use for her own purposes and may alienate the income of her husband's estate which has accumulated in her hands. It is said that she is not confined to the current income. Secondly, that should she invest the income and make a distinction between those investments and the original estate she can at any time thereafter deal with such investments. Thirdly, that should she invest the savings in such a way as to shew that she intended to increase the original estate by such investment, she cannot afterwards deal with such investments except for reasons which would justify her dealing with the original estate. And, fourthly, that should she invest the savings in property held by her without making any distinction between the original estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate.

"The whole question is, I think, one of intention. If she has once shewn her intention to augment her husband's estate she cannot alter; but if she evinced no such intention, she can at any time during her life deal with the profits.

"The fourth proposition is established by the recent case of *Sheolochun Singh* v. *Sahib Singh* (1).

"The third proposition is laid down in the case of *Isri Dutt Koer* v. *Hansbutti Koerrain* (2). At page 161 of the report in the Law Reports, their Lordships of the Privy Council, after pointing out that no distinction was then made between the original estate and the after-purchases, say: 'These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purposes which would not justify alienation of that original estate.'

"For the first proposition there is, I think, ample authority. *Soorjeemoney Dossee* v. *Denobundoo Mullick* (3) decides the absolute

(1) Law Rep. 14 Ind. Ap. 63; S.C. Ind. L. R. 14 Calc. 387.

(2) Law Rep 10 Ind. Ap. 150; S.C. Ind. L. R. 10 Calc. 324.

(3) 9 Moore's Ind. Ap. Ca. 123.

J. C. 1892

SOWDAMINEE DOSSEE v. ADMINISTRATOR GENERAL OF BENGAL.

right of the widow in her own right to the accumulations since the death of her husband, and in that case, as in the present, the income had not accumulated in the hands of the widow herself, but in the hands of the person from whom she was seeking to recover. That case shews that her right to them is not affected by the fact that she may receive them in a lump. Whether she receives them as they fall due, or whether she receives them after they have accumulated in the hands of others, her right is the same. In *Grose* v. *Amirtomayi Dossee* (1), Mr. Justice *Macpherson* held that the accumulations followed the *corpus*; but, as pointed out by the Privy Council in *Isri Dutt Koer* v. *Hansbutti Koerrain* (2), the opinion expressed by Mr. Justice *Macpherson* seems to be at variance with the case of *Soorjeemoney Dossee* v. *Denobundoo Mullick* (3). Much reliance was placed by Mr. *Pugh* on the case of *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (4); but on a careful consideration of the case, I do not think it has in reality any bearing on the present. There, what the widow was receiving, or at any rate the greater part of it, represented the *corpus* of the husband's estate. The result of the compromise was, that a sum of money was allotted to her as compensation for her husband's share. In the present case, the money received by the widow was in respect of her right to the profits after her husband's death. At p. 25 of the report, the learned Judge delivering the judgment of the Privy Council shews that the present question was to some extent considered by the Board, but that they did not think it necessary to decide it. In *Isri Dutt Koer* v. *Hansbutti Koerrain* (5) the Privy Council say: 'It is impossible to read Mr. Justice *Ainslie's* forcible argument, without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again, may she not place her savings so as to get

(1) 4 B. L. R. O. C. 1.
(2) Law Rep. 10 Ind. Ap. 150; S.C. Ind. L. R. 10 Calc. 324.
(3) 9 Moore's Ind. Ap. Ca. 123.
(4) 6 Moore's Ind. Ap. Ca. 1.
(5) Law Rep. 10 Ind. Ap. at p. 158.

some income from them? And so on through all the steps of the sorites.' About the first proposition there is, I think, no doubt.

"With regard to the second proposition, I think, I must hold that if a Hindu widow invests the income of her husband's property in the purchase of other property as a permanent investment, she cannot afterwards alienate it. Judging from expressions which have been used by the Privy Council, I think it possible that if the matter were again considered, the power of the widow over the property might be established; but I am bound by what the Privy Council say in *Isri Dutt Koer* v. *Hansbutti Koerrain* (1). After examining the authorities on this very question, they there say—'This is the state of the authorities, and their Lordships, differing from the learned Judges below, think it must be taken as adverse to the claim made on behalf of the widow.' The question has never been expressly decided either by the Privy Council or by a Full Bench of this Court; but as a Judge of an Original Court, I must act upon what has been held to be the state of the authorities.

"The question here is really on the facts. Has there been an investment of a permanent nature such as to add to the *corpus* of the husband's estate, or rather, as in this case the residue of the estate went to *Shama Churn Mullick*, such as to render it available to the heirs of the husband. All the cases in which property bought by the widow out of the profits of her husband's estate has been held to belong to that estate are cases where immoveable property has been bought. In no one of the cases that have been cited, except in the case of *Mussamut Bhagabutti Daee* v. *Chowdhry Bholanath Thakoor* (2), where the expressions used have been held only to apply to the particular case (3), has it been held that a widow cannot purchase jewellery or other moveable property for her own absolute use out of the profits of her husband's estate. Were she to advance to any person any portion of the profits by way of loan, does she by doing so make the money advanced by her a portion of her husband's estate? I think not. If it were so, having once lent any money, she would never lend it again. I do not know that there is any real difference

(1) Law Rep. 10 Ind Ap. at p. 160. (2) Law Rep. 2 Ind. Ap. at pp. 260–1.
(3) See Ind. L. R. 10 Calc. 337.

J. C. 1892

SOWDAMINEE DOSSEE v. ADMINISTRATOR GENERAL OF BENGAL.

between the case of lending money to a private individual on a promissory note and purchasing a Government promissory note. The notes are purchased more as a convenient and safe mode of keeping the money than as an investment of a permanent nature. Putting the case in another way, does a widow by using the money alter her rights in it? Were she to accumulate it in her house, or in a bank, she would retain her absolute right. I do not think that the fact that she lends it out at interest to Government alters her right. There might be a case where a widow in buying Government paper shewed that she intended to augment her husband's estate; but there is no evidence which can suggest this here. There is everything to the contrary here. There was no estate of her husband's in her hands for her to augment. I do not think that the law intends the husband's estate to benefit by any investment which is not of a permanent nature, and I do not think that the widow here intended the money to remain permanently in Government paper.

"I find as a fact that the widow by purchasing the Government paper did not intend to augment her husband's estate, and that she kept it distinct from her husband's estate. On the fifth issue I find that *Badam Coomaree* had power to dispose of the Government paper which she made over to Mr. *Broughton* on the trusts of the deed of settlement."

On the 18th of March, 1889, the Appellate Bench dismissed that appeal, on the ground, generally, "that there was no presumption here of its (*i.e.*, the accumulated rents of eight years) having been accumulated by her for the benefit of the other heirs of *Nobo Coomar*," and that the evidence shewed no intention to invest those accumulations for any other person's benefit than her own.

Sir *Horace Davey*, Q.C., and *Doyne*, for the Appellant, referred to the deed of arrangement between *Shama Churn*, the executor and residuary legatee, and *Badam Coomaree* of the 14th of August, 1866. They contended that by that deed the sum of Rs.2,89,000 was taken and acknowledged to be taken by the widow as portion of the *corpus* of her husband's estate, and that on her death so much of that sum as had not been actually

expended by her devolved on her husband's heirs at her death. On that view the balance of Rs.269,000 which had been invested by her in Government securities, and is the fund in suit, followed that course of devolution, and could not be alienated by her.

The question turns on the evidence as to the widow's intention. If she spent the income of her husband's estate she was within her rights; if she saved and invested them with the intention that they should belong to her they would be her stridhan, and she would have the power of alienation contended for. Otherwise, the accumulations would follow the *corpus* and belong to her husband's estate. The widow in this case has not shewn her intention to appropriate those savings, either by the deed or by any other acts during her life down to the time of her attempted alienation. The testator never intended that those accumulations should belong to her; her investment of them shewed that she intended, in the absence of any contrary declaration, that they should fall into the *corpus* of the estate. Reference was made to *Gonda Kooer* v. *Kooer Oodey Singh* (1), and to *Sheolochun Singh* v. *Sahib Singh* (2); *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (3). For twenty years the widow had preserved these investments, and made no attempt to dispose of them. It was contended that that was strong confirmation of the option originally exercised by the act of investment, to capitalize for the benefit of the reversionary heirs in lieu of spending for herself: see *Isri Dutt* v. *Hansbutti Koerrain* (4).

Cowie, Q.C., *Graham*, Q.C., and *Cave*, for the Respondent *Grish Chunder Roy*, contended that the evidence shewed that the widow intended to blend her investments of the accumulations with her separate estate. It was never amalgamated with her husband's estate. They were sums which she took as heiress, undisposed of by the will, being annual income and profits from her husband's estate, with full power to spend or to accumulate for her own benefit. She had full power to alienate them as she did, and the fact that she did dispose of them is conclusive, even if doubts could be raised on any other part of the case, to shew

(1) 14 Beng. L. R. 159.
(2) Law Rep. 14 Ind. Ap. 63.
(3) 6 Moore's Ind. Ap. Ca. 1.
(4) Law Rep. 10 Ind. Ap. 150.

J. C. 1892 SOWDAMINEE DOSSI'E v. ADMINISTRATOR GENERAL OF BENGAL.

that she had all along regarded them as her separate estate, and intended to treat them as such. It cannot be contended but that there was intestacy as to these accumulations. The widow received them from the executor as the heiress of the testator entitled as in case of an intestacy in her own right, confirmed by his consent, to complete power over them, and there is no reasonable ground for denying her title. Reference was made to *Soorjeemoney Dossee* v. *Denobundhoo Mullick* (1).

Branson, for the Administrator-General.

Doyne, replied.

1892 Dec. 16.

The judgment of their Lordships was delivered by

LORD SHAND :—

On this appeal the only question raised for decision is whether *Sreemutty Badam Coomaree Dossee*, the widow of *Nobo Coomar Mullick*, a member of the *Mullick* family of *Calcutta*, had power to dispose as she did by a deed executed by her on the 12th of July, 1886, about two months before she died, of certain Government of *India* promissory notes. These Government securities were purchased with a sum of Rs.2,69,500, which she had received out of her husband's estate, and a further sum of Rs.10,600, being interest which had accrued during her lifetime on that amount. *Trevelyan*, J., held that *Badam Coomaree* had absolute power to alienate and dispose of these securities, and his decision was confirmed by the Appellate Court.

The Appellant's contention has been that the sum of Rs.2,69,500, and the Government securities for that amount, were possessed by *Badam Coomaree*, not as her own property with a power of alienation, but as part of the estate of her husband *Nobo Coomar Mullick* in which she had the right or interest only of a Hindu widow.

The circumstances in which she obtained possession of this fund, which are very peculiar, may be shortly stated. Her husband, who was a man of very large means, real and personal,

(1) 9 Moore's Ind. Ap. Ca. 123.

by his will dated the 15th of March, 1856, appointed his widow and his younger brother, *Sham Churn Mullick*, his executors, to manage his estate; and he directed that his widow should receive for maintenance and for the expenses of religious acts and observances one lakh of rupees. Having no son, he, by the 9th clause of his will, made the following provision in regard to his general estate: "Should my executor, *Sreeman Sham Churn Mullick*, my younger brother, have more than two sons within eight years from this date, in that case such son shall be made my adopted son. Should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother within the specified time of eight years power is reserved for adopting up to the extent of a third time. Should brother have no more than two sons, or the adopted sons shall die one after the other, in that case the share belonging to me of Company's papers and lands and houses and gardens and so forth, the whole real and personal estate will be received by my younger brother *Sreeman Sham Churn Mullick*." This which was the only clause in the will regulating the disposal of the general estate of the testator, made no special provision in regard to the income of the estate during the eight years in the course of which the testator's brother might have a son who could be validly adopted as the testator's heir.

Sham Churn Mullick had one son only, and consequently the power of adoption conferred by the testator on his widow could not be exercised. During the eight years which elapsed after the testator's death, *Sham Churn Mullick* himself administered the estate, and received the income and retained it. On the expiry of that time *Badam Coomaree* not only required payment of the lakh of rupees to which she had right by the special direction in her husband's will, but also of the eight years' income which had not been specifically disposed of by the will, and which she maintained to be intestate succession falling to her as her husband's widow and heiress. *Sham Churn Mullick* contested this claim, and seems for a time to have maintained that the income of these years became his property under the general destination to him of the real and personal estate of the testator.

J. C.
1892
SOWDAMINEE DOSSEE v. ADMINISTRATOR GENERAL OF BENGAL.

This dispute and other questions which had arisen between the parties were settled by a deed of agreement dated the 14th of August, 1866. That deed narrates the will, and states the question which had arisen regarding the accumulated income of eight years; and the nature of the widow's claim and the arrangement in regard to it are thus stated: "And I the said *Sreemutty Badam Coomaree Dossee*, as the sole widow, heiress, and legal personal representative of the said *Nobo Coomar Mullick*, deceased, claim to have the accumulations of the said estate from the time of his death down to the expiration of the said eight years next succeeding his death, the same, as I contend and am advised, being residuary estate undisposed of by the said will of the said *Nobo Coomar Mullick*. And whereas the said *Sham Churn Mullick* has consented and agreed to concede the point in question, and to give up to me as such heiress of the said deceased the accumulations of the said estate from the death of the said deceased for the period of eight years, the time within which the contingency of a son being born to the said *Sham Churn Mullick* to be adopted by me was limited and fixed." The deed then goes on to state that, in order to avoid the delay and expense of taking an account of the accumulations, it had been agreed by the parties that the amount should be taken at Rs.2,89,000, and, this amount having been paid to her, *Badam Coomaree* granted a full discharge of all her claims for these accumulations. Before leaving the deed it should be mentioned that, in respect of payment then made to her, *Badam Coomaree* also discharged *Sham Churn Mullick* of her legacy of Rs.1,00,000 and Rs.62,450 of interest which had accrued on it; and she also granted a discharge for payment of a sum of Rs.24,000 which she accepted as compensation for relinquishing her right to live in her husband's family house on the estate. The several sums payable and paid under this deed amounted in the aggregate to Rs.4,75,450, and the payment was made in currency notes of various amounts, the most of these being one thousand rupee notes, others being notes for Rs.500 and Rs.100.

Out of the sum of Rs.2,89,000 of accumulated income *Badam Coomaree* paid away about Rs.20,500 for law and other costs, and with the balance, as well as with the other sums above men-

tioned received from her brother-in-law, she purchased Indian Government promissory notes yielding interest payable half-yearly. She survived till the 7th of September, 1886, and, as already mentioned, in July of that year she executed a deed of settlement and trust, by which she transferred to the Administrator-General of *Bengal* as trustee the securities in which she had invested the sum received as the eight years of accumulated income from her husband's estate, after deducting costs and charges, and also other Indian Government promissory notes for Rs.10,600, being part of the interest which had accrued on the securities originally bought, which had not been spent by her in the meantime. The purposes of the trust were generally the payment to herself or for her use of the interest or dividends of the securities during her life, and after her death a provision that the securities should be held in trust for *Grish Chunder Roy*, her grandson, whom she had resolved to bring up as her son, and his heirs and assigns, for his and their absolute use and benefit.

The Appellant, alleging that she, and her sister called as a Defendant, are the only heirs now alive of *Nobo Coomar Mullick* entitled to succeed as his heirs in intestacy, has brought her suit, claiming right to the Government securities, and in her plaint she alleges that these form part of the estate of *Nobo Coomar Mullick*, that *Badam Coomaree* was not entitled to indorse or convey them away, as she did by the deed of the 12th of July, 1886, and that this deed is invalid.

The ground on which this claim has been supported in argument is, that under the provisions of the ninth clause of the will of *Nobo Coomar Mullick* there was an implied direction by the testator that the income of his estate should be accumulated and capitalized for the eight years during which *Sham Churn Mullick* might have a son to be adopted, and that under the deed of arrangement and compromise and release of the 14th of August, 1866, between *Badam Coomaree* and *Sham Churn Mullick*, *Badam Coomaree* claimed and accepted the accumulated income as a capitalized sum which in her hands was part of the capital of the estate of her husband; that she, therefore, acquired only a Hindu widow's interest in the fund, and was not entitled to alienate it or deal with it in any way which would deprive *Nobo*

J. C. 1892

SOWDAMINEE DOSSEE v. ADMINISTRATOR GENERAL OF BENGAL.

Coomar Mullick's heirs of their right to receive it as part of his estate to which they had a right of succession. If this view of the purport and effect of these instruments were sound there might be great force in the argument of the Appellant.

Their Lordships are, however, clearly of opinion that the view presented by the Appellant is not warranted by the terms of the will and the deed of arrangement. As regards the will of *Nobo Coomar Mullick*, all parties are agreed that it gives no specific direction as to what was to become of the income of the estate until the adoption of a son to be born to *Sham Churn Mullick*, or until the expiry of the eight years during which a son, to be adopted, might be born. There is no direction in the deed either to capitalize or to accumulate that income, and nothing, in their Lordships' opinion, from which such a direction can be held to have been implied. The income as it fell due each year after the testator's death became either the property of *Sham Churn Mullick* under the general destination to him of the testator's whole real and personal estate (and were the question still open, it seems difficult to suggest a reason for holding that it was not covered and conveyed by that destination), or it was entirely intestate succession which, as it fell due, became the absolute property of *Badam Coomaree* as the widow and heiress of her husband. And accordingly it was this right which *Badam Coomaree* maintained in the dispute on the subject which arose between her and *Sham Churn Mullick*, and which he yielded to her by the deed of agreement and release. The language of the deed being: "And whereas the said *Sham Churn Mullick* has consented and agreed to concede the point in question and to give up to me as such heiress of the said deceased"—that is, as appears from the sentence preceding, as the heiress and legal personal representative of the said *Nobo Coomar Mullick*—"the accumulations of the said estate from the death of the said deceased for the period of eight years." The claim of *Badam Coomaree* to this part of the income of her husband's estate was made by her as heiress of her husband entitled to income not disposed of. She claimed this income as her absolute property, and their Lordships can see nothing in the language of the deed of agreement, or in the transaction with *Sham Churn Mullick*,

which can support the Appellant's contention that she agreed to receive this income as capital in which she should acquire only the estate of a Hindu widow, or that the nature of the fund should differ in any way after she received it from what it had been before.

There is nothing to support the Appellant's argument in the circumstance that the income was received in one sum, and only after the lapse of eight years after her husband's death. The right she claimed was to receive payment as the income came in. That was a question between her and *Sham Churn Mullick*. If he had immediately on the testator's death taken the same view as he took when the agreement was made, all the income would have reached the widow's hands as it accrued, and there could have been no question as to the character in which she took it. It cannot make any difference that the title was not admitted for eight years, and that pending the uncertainty the income was accumulated. The administration of the estate was left entirely in the hands of *Sham Churn Mullick*, and it was only after the lapse of eight years that *Badam Coomaree* received from him even the lakh of rupees left to her for her maintenance, and that a general settlement of her claims was made.

In this state of the facts there seems to be no ground for the Appellant's claim. Although at the earlier stage of the argument it was suggested that, even if the fund was to be regarded as income and not capitalized estate, it nevertheless became the husband's estate, because of the subsequent actings of *Badam Coomaree*, this view was hardly maintained in the reply by the Appellant's counsel.

The Appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the *corpus* of the estate never came to the widow, but was taken by *Sham Churn Mullick* under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund. To use the words of Mr. Justice *Trevelyan* in reference to *Badam Coomaree's* position: "There

J. C. 1892

SOWDAMINEE DOSSEE v. ADMINISTRATOR GENERAL OF BENGAL.

was no estate of her husband's in her hands for her to augment." She did nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs. But the fact is, that having received the money in currency notes which yielded no return and the keeping of which was attended with much risk, she at once placed it, as any prudent person would do, in securities, investing it in Government promissory notes yielding regular interest, but which were negotiable instruments transmissible by mere indorsation. It is important also to observe that the other funds which she received from *Sham Churn Mullick* were invested precisely in the same way and at the same time, and that for purposes of investment, therefore, the fund in dispute was not kept separate, but was mingled with her general personal means; and she seems to have used the interest and income of the whole indiscriminately for her maintenance, and spent the greater part of it. It may be further mentioned that, while her trust settlement by which she conveyed the income in question was executed in 1886, this deed superseded an earlier testamentary deed of 1882, which she cancelled in 1886, in which she distinctly records her view that she had received the fund as her absolute property, and had placed it in Government securities "for my own absolute benefit, and without any intention or desire to make the same or any part thereof accumulations to the estate of the said *Baboo Nobocoomar Mullick*, but, on the contrary, with the full intention of having, retaining and exercising full and uncontrolled dominion by will, deed, or otherwise over the same and every part thereof."

Their Lordships, being thus of opinion that the fund in question was not in any sense received by *Badam Coomaree* as capital or capitalized income of her husband's estate, but was received as income which, under the arrangement with *Sham Churn Mullick*, was her own absolute property, and further that she

never indicated any intention to make the same part of her husband's estate for the benefit of his heirs, will humbly advise Her Majesty to dismiss the appeal, and the Appellant must pay the costs of the appeal, which, however, will be one set of costs only to the Respondent *Grish Chunder Roy*.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitor for Respondents: *J. F. Watkins.*

RAJA SURJA KANT ACHARYA . . . DEFENDANT;

AND

RANI HEMANTA KUMARI DUBI . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Bengal Act VIII. of 1869, *ss.* 46, 31—*Deposit of Rent in Court—Limitation.*

In a suit brought for rent at an enhanced rate more than six months after notice of a deposit of rent in Court under sect. 46 of *Bengal Act* VIII. of 1869, it appeared that the deposit had been made before the rent had accrued due:—

Held, that such suit was not barred by sect. 31.

CONSOLIDATED APPEALS from two decrees of the High Court (Feb. 1, 1889), affirming two decrees of the Subordinate Judge of *Meymenzingh* (Feb. 28 and May 28, 1887).

The facts are stated in the judgment of their Lordships.

Cowie, Q.C., and *Branson*, for the Appellant, contended that the original Plaintiff had no title to institute the suit. Her title to do so ceased when her son came of age. She had come into possession as her husband's heir—a possession which the Appellant could not dispute—and he was bound to pay the rent to her until her title ceased. Then she adopted *Jotindra*, who on attaining majority became the proper Plaintiff. There was evidence that he had attained eighteen years before the plaint was filed. Even if he had not done so, the original Plaintiff must shew that notwithstanding the adoption she still had a right to

* *Present*:—LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1892
RAJA SURJA KANT ACHARYA v. RANI HEMANTA KUMARI DUBI.

sue: see *Ram Kannye Gossamee* v. *Meernomoyee Dossee* (1). At the date when *Jotindra* was substituted as Plaintiff, the suit was barred by sect. 29 of Act VIII. of 1869: see Act XV. of 1877, s. 22. As regards the notice of enhancement, that was neither sufficient in its terms nor properly served, and no grounds of enhancement were shewn. The second suit, which was for rent for the years 1289, 1290, and 1291, is barred by the deposit of the rent admitted to be due under sect. 31 of the Act: see sect. 46 and *Jeebun Munder* v. *Taramonee Koomaree* (2), a case decided under *Bengal Act* VI. of 1862.

Sir *Horace Davey*, Q.C., and *Doyne*, for the Respondent, were heard only as to the service of the notice of enhancement. It was served on the 29th of December, 1880, under sect. 51, Regulation VIII. of 1793, and sect. 14 of *Bengal Act* VIII. of 1869. It alleged that the Appellant's tenure was held at a variable rent, and that the then rate was lower than prevailed in the district for the same class of lands. It called on the Appellant to appear at the zemindar's office and engage to pay rent according to a specified enhancement. It was contended that such notice complied with the direction of the Acts.

Cowie, Q.C., replied.

1892
Dec. 16.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in the first of these appeals was brought by *Sarat Soondari Debi*, widow, executrix of the late *Raja Jogendra Narain Roy*, to recover from the Appellant the rent at an enhanced rate for one year, ending on the 11th of April, 1882, of a separate 10 annas share of lands held by the Appellant under a lease which was perpetual and heritable, but the rent of which was liable to be enhanced under the provisions of Act VIII. of 1869 of the *Bengal* Council. *Raja Jogendra Narain Roy*, who was the owner of the 10 annas share, married *Sarat Soondari Debi*, and after his death, the date of which does not appear in the proceedings, she adopted a son to him, named *Kumar Jotindra*

(1) 2 Suth. W. R. 49. (2) 6 Suth. W. R. Act X. Rulings, p. 99.

Narain Roy, who married the Respondent, and is now dead. The first Court decided that the Plaintiff was entitled to rent for the year at an enhanced rate, and made a decree for it, fixing the amount. This decree was affirmed on appeal by the High Court.

The plaint stated that the Plaintiff had the title to and the possession of the 10 annas share, which, by a partition of the zemindari, was recorded as No. 122 in the Collectorate of the District, and that the Defendant had been paying to the Plaintiff the old rent. The Defendant, the present Appellant, in his written statement took many objections to the suit; but Mr. *Cowie*, in opening the case for him, said that the only question for determination by their Lordships was whether the Plaintiff had a right to bring the suit. This question was raised in the written statement, by the allegation that *Jotindra Narain Roy*, having come of age long before the institution of the suit, the Plaintiff was not entitled to bring the suit in respect of the zemindari left by her husband. The first of the settled issues is: "Whether the Plaintiff has a right to sue for enhancement?" Now the allegation in the plaint that the Defendant had been paying the old rent to the Plaintiff was not denied. Consequently the Defendant could not dispute the Plaintiff's title. He could only shew that it had expired, and that therefore the Plaintiff was not entitled to any rent. In addition to his written statement, the Defendant, in a petition filed on the 5th of December, 1883, in answer to a petition filed by *Jotindra Narain Roy* for the substitution of his name for that of the Plaintiff, said that the Plaintiff was the owner only during the son's minority, and that, as the son attained majority before the institution of the suit, she had no right to bring it. Construing the issue with the written statement and this petition, the question to be tried appears to be whether the son had come of age before the institution of the suit. This would be the question, whether the Plaintiff was suing in her own right or as guardian of her minor son. It is unnecessary to consider the effect of the title to the plaint, where she is called "widow of the late *Raja Jogendra Narain Roy*, mother of *Sriman Kumar Jotindra Narain Roy*, minor," which may be consistent with her suing in

J. C. 1892

RAJA SURJA KANT ACHARYA v. RANI HEMANTA KUMARI DUBI.

either character. The plaint rather supports the view that she was suing in her own right. Two of the Plaintiff's witnesses deposed on cross-examination to the age of *Jotindra Narain Roy*. The Defendant did not give any evidence of it. A will of *Jotindra Narain Roy*, made when he admittedly was of age, referring to a previous will executed by him, was also relied upon. Their Lordships agree with the judgment of the High Court, which said that it was impossible to form any conclusion from the statement in the will, and impossible from the evidence of the witnesses to come to any reasonable conclusion as to his exact age, or that he had attained majority before the institution of the suit. Therefore the only question for their Lordships' determination must be decided in the Plaintiff's favour, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal.

The suit in the second appeal is between the same parties, and was brought for enhanced rent of the property for the three subsequent years and part of a fourth year. The only defence relied upon before their Lordships was that the old rent and cesses for each of the three years were tendered to the Plaintiff in proper time, and she not having accepted them they were deposited in Court under Act VIII. of 1869 (*Bengal* Council), and the Plaintiff brought no suit within six months of the date of the deposit, and so the claim for rent at an enhanced rate was barred by a special law of limitation. As to the part of the rent for the fourth year, the defence was that the rent was payable yearly and was not due. Sect. 46 of Act VIII. of 1869 enacts that if any under-tenant or ryot shall tender payment of what he shall consider to be the full amount of rent due from him at the date of the tender, and if the amount so tendered shall not be accepted and a receipt in full forthwith granted, the under-tenant or ryot may deposit the amount in the Court having jurisdiction to entertain a suit for the rent. By sect. 47, the Court is to issue a notice to the person to whose credit the money has been deposited, and serve it. By sect. 31, it is enacted that whenever a deposit on account of rent shall have been made no suit shall be brought against the person making the deposit on account of any rent which accrued due prior to the date of the

deposit, unless the suit be instituted within six months from the date of the service of the notice required by sect. 47. The rent for the first of the three years became due on the 12th of April, 1883; for the second on the 11th of April, 1884; for the third on the 12th of April, 1885. The deposits were made on the 10th of April, 1883, the 8th of April, 1884, and the 11th of April, 1885, all before the expiration of the year when the rent became due. The words of the Act are plain that the deposit must be of rent which accrued due prior to the date of the deposit. They do not admit of any other construction. The first Court disallowed the rent for the part of the fourth year on the ground that it was not due, and made a decree for rent for the three years at the rate which had been fixed for the year in the previous suit. The High Court, on appeal, affirmed that decree, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The Appellant will pay the costs of the appeals.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondent: *T. L. Wilson & Co.*

J. C.* 1892 Nov. 15, 16; Dec. 10.

MOHESH NARAIN MOONSHI . . . . PLAINTIFF;

AND

TARUCK NATH MOITRA AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Second adoption—Suit to "set aside" an Adoption—Limitation—Act IX. of 1871, *Art.* 129, *Sched.* 2.

According to Hindu law a valid second adoption cannot be made when a son under a previous adoption is alive.

Rungama v. *Atchama* (4 Moore's Ind. Ap. Ca. 1).

Held, that this suit, having been brought to recover possession on the ground that the Defendant's adoption was invalid, was a suit to "set aside an adoption" within the meaning of the *Limitation Act* of 1871.

Jagadamba Chowdhrani and Others v. *Dakhina Mohun and Others* (Law Rep. 13 Ind. Ap. 84) followed.

Consequently, twelve years having elapsed from the date of adoption before the Act was passed, the suit, which was not instituted till after April 1, 1873, when the Act came into force, was barred by art. 129, Sched. 2.

APPEAL from two decrees of the High Court (Sept. 4, 1889, and Feb. 25, 1890) reversing a decree, so far as it was favourable to the Appellant, of the Subordinate Judge of *Pubna* and *Pogra* (June 14, 1887), and dismissing the Appellant's suit as barred by limitation.

The facts are stated in the judgment of their Lordships.

The first Court held that the Plaintiff had a good title as adopted son, and that the Defendant had no title, either by adoption or estoppel, or as the son of his adoptive mother. He held upon the construction of the anumati patra that it was a will which conferred life estates upon *Shib Narain's* mother and his widows successively, with remainders in fee to the adopted sons; and that this disposition was not revoked by the subsequent acts of *Shib Narain* in the matter of the Plaintiff's adoption, or by the conduct of the widows in applying for a certificate. The result, therefore, would be, that the Plaintiff's right to one moiety held by *Tripura* did not arise till her death in 1884, and

* *Present*:—LORD MACNAGHTEN, LORD SHAND, SIR RICHARD COUCH, and SIR EDWARD FRY.

was therefore not barred by arts. 140, 141 of Act XV. of 1877, nor by art. 129 of Act IX. of 1871, as interpreted by the Judicial Committee in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1).

The High Court arrived at a different conclusion from that of the original Court as to the effect of the anumati patra. They considered that that document, if it stood alone, would have interposed life estates of the widows before the interests of the adopted sons arose; they thought, however, that this intention had been changed so early as June, 1845, when *Shib Narain's* petition was presented to the Deputy Collector, and that the documents which were exchanged at the time of the Plaintiff's adoption excluded the idea that his estate as heir to his father was to be postponed to that of the widows. The subsequent petition to the Collector, in May, 1848, did not revive the anumati patra in its entirety, but merely repeated the authority it gave for a second adoption. That being so, the Plaintiff's title accrued at the death of *Shib Narain* in 1850, and the adverse possession of *Tripura Soondari* and her son, accrued at the latest in 1869, when the separation between the widows took place. The result was that the suit was barred by art. 141 of Act XV. of 1877.

The High Court also considered that long before the Act of 1877 came into force the suit had been barred by art. 129 of Act IX. of 1871, inasmuch as the Plaintiff could not have recovered the whole property at any time after the second adoption in 1851, without setting it aside, and therefore, according to the decision in Law Rep. 13 Ind. Ap. 84, the statute ran from the date of the adoption.

Doyne, and *C. W. Arathoon*, for the Appellant, contended that the suit was not barred by limitation; either by adverse possession of over twelve years by the Defendant No. 1, or by reason of the Appellant not having challenged the adoption within twelve years of its taking place within the meaning of art. 129, Act IX. of 1871. The case falls under art. 141 of Act XV. of 1877, so far as that Act applies, and not under art. 118. Reference was made to *Raj Bahadoor Singh* v. *Achumbit Lal* (2). This is

(1) Law Rep. 13 Ind. Ap. 84. (2) Law Rep. 6 Ind. Ap. 110.

J. C.
1892
MOHESH NARAIN MOONSHI v. TARUCK NATH MOITRA.

a suit to recover possession of property within the meaning of that case, and it is brought within twelve years from the time when the right accrued. It was brought in 1885, and *Tripura Soondari*, whose possession was in her own right as a person entitled for life under the anumati patra, and therefore not adverse to the Plaintiff, died in 1884. Till that year the Plaintiff had no cause of action. There is a distinction between the Acts of 1871 and 1877. This is not a suit to set aside an adoption, within the meaning of the former Act and of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1). Even if it were, that Act has been superseded by the Act of 1877, which contains different words on this subject. Reference was made to *Basdeo* v. *Gopal* (2). Unless such distinction exists the appellant has no case.

Sir *Horace Davey*, Q.C., and *Mayne*, for the respondents, contended that the Plaintiff was out of possession from the time of the division come to in 1869; from which date there was a complete separation, and that is the latest date at which adverse possession began. Under the anumati patra *Tripura Soondari* was not entitled to possession, nor did she, in fact, maintain possession. Each adopted son was in possession of his own moiety from the date of the second adoption. Whatever possession the widows had was on account of their sons as guardians. This case falls strictly within the ruling in Law Rep. 13 Ind. Ap. 84. It is a suit to set aside an adoption, for so long as the adoption stands the Plaintiff has no title. The suit was barred therefore by the Act of 1871, and the Act of 1877 could not revive a right so barred. Reference was also made to *Appasami Odayar* v. *Subramanya Odayar* (3).

Doyne, replied.

1892
Dec. 10.

The judgment of their Lordships was delivered by

LORD SHAND:—

The Plaintiff is in possession, as proprietor, of one moiety of the estate moveable and immoveable of the deceased *Shib*

(1) Law Rep. 13 Ind. Ap. 84. (2) Ind. L. R. 8 Allah. 644.
(3) Law Rep. 15 Ind. Ap. 167.

Narain, and in this suit he seeks to have it declared that he is entitled as proprietor to possession of the other moiety of that estate. The Plaintiff's undisputed right to the half of the estate in his possession arises from the fact that *Shib Narain*, who died in 1850, had adopted him as his son in 1848. The principal Defendant, *Girish Narain* (hereinafter referred to as the Defendant), in possession of the other half of the estate, maintains his right to continue in possession, and to have the plaint dismissed on the ground (1.) that he also is an adopted son of the late *Shib Narain*, having been adopted as such by *Tripura Soondari Debi*, the second of two surviving wives of *Shib Narain*, who made the adoption by authority of her husband, alleged to have been conferred in a deed of anumati patra granted by him in 1844, about six years before he died, and (2.) that in any view the suit is barred by limitation on two separate and independent grounds, one being the Defendant's possession of the property claimed for upwards of twelve years before the present suit was instituted, the other the lapse of twelve years after the Defendant's adoption without any suit having been raised to set the adoption aside. The Subordinate Judge held that the suit was not barred by limitation on either of the grounds now stated, and gave a decree in favour of the Plaintiff; but on appeal to the High Court this decree was reversed, and the suit was dismissed, the Court having held that the suit was barred by limitation on each of the separate grounds pleaded.

The validity of the Plaintiff's adoption has not been disputed in this appeal. On the other hand, it is clear that the adoption of the Respondent was invalid, for it has been long settled, according to the Hindu law of adoption and succession, that a valid second adoption cannot be made when a son under a previous adoption is alive: *Rungama* v. *Atchama* (1). The Plaintiff accordingly would be entitled to succeed, if his suit were not barred by limitation; and on the question of limitation the decision of the appeal depends.

Shib Narain was survived by his two wives, *Hurro Soondari*, to whom he had given the Plaintiff as a son at the time of his adoption, and *Tripura Soondari*, who, as already stated, after her

(1) 4 Moore's Ind. Ap. Ca. 1.

J. C. 1892

MOHESH NARAIN MOONSHI v. TARUCK NATH MOITRA.

husband's death, adopted the Respondent. *Tripura Soondari* survived till the year 1884, and in the following year, 1885, the present suit was instituted, *Hurro Soondari* (who has since died) having been called as a "*pro formâ* Defendant." The Plaintiff's answer to the plea of limitation, in so far as founded on adverse possession, is that *Tripura Soondari* and not the Defendant was the person in possession of the moiety of the estate in dispute till her death, and that consequently until that event occurred no cause of action for possession arose. The Plaintiff, referring to the provisions of the anumati patra by *Shib Narain* of 1844, alleges that it gave to each of his two widows a right to a liferent of a moiety of his estates, and that, at least after the death of *Shib Narain's* mother (to whom the Plaintiff maintains that a liferent of the whole estates was given by the same deed, and who died four years after her son), *Tripura Soondari* obtained and continued in possession of the moiety now in dispute till she died. In reply to this defence the Defendant has maintained, first, that any liferent right intended to be conferred by *Shib Narain* on his wives by the anumati patra was conditional on his death without having adopted a son, and that as he afterwards adopted the Plaintiff no such right of liferent existed on his death. Again, it was maintained that at least the Plaintiff's adoption, taken in connection with certain subsequent actings by his father, prevented the acquisition of any liferent by his widows; and further that, in any view, in point of fact neither of the widows were in possession or maintained a right to possession as for themselves. The Defendant alleges that after *Shib Narain's* death, and after his adoption by *Tripura Soondari*, possession was all along held by the Plaintiff and Defendant as adopted sons. He contends that their respective mothers, in so far as they acted, did so originally as guardians of their adopted sons, who were minors, and that such possession as the widows continued to have after the sons respectively came of age was held on behalf of their sons as having the right of ownership of the estates.

Much of the argument on the appeal related to the points just mentioned, and involved a critical examination of the provisions of the anumati patra, and the actings of the parties,

particularly as bearing on the character of the alleged possession of the widows. Their Lordships have, however, come to the conclusion (without expressing any dissent from the view of the High Court that the suit is barred by adverse possession) that it is unnecessary to form any opinion on these questions, for their Lordships are satisfied that the defence of limitation has been clearly established on the other ground, viz., the long unchallenged adoption of the principal Defendant, notwithstanding his assertion of the *status* and right of an adopted son, and his enjoyment, with the complete knowledge of the Plaintiff, of the advantages which that *status* gave him.

The *Limitation Act* of 1871, which applies to the time when the period of limitation was running in that case, required by art. 129 of the second schedule that any suit to set aside an adoption should be instituted twelve years from "the date of the adoption, or (at the option of the Plaintiff) the date of the death of the adoptive father." The present is not a suit in which the Plaintiff expressly asks for a decree to "set aside" the Defendant's adoption, or to obtain a declaration that the "adoption was invalid," which would probably be a more apt expression to use. The Plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the Defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption directly involves the decision of the question—was the adoption invalid? In the case of *Jagadamba Chowdhrani and Others* v. *Dakhina Mohun and Others* (1), which was very fully argued and carefully considered, it was settled that a suit to set aside an adoption within the meaning of these words in the *Limitation Act* need not be a suit having declaratory conclusions, but that any suit in which the decree prayed for involves the decision of the question of validity of an adoption set up in defence is a suit to set aside an adoption. It was there said: "It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle

(1) Law Rep. 13 Ind. Ap. 84.

J. C. 1892

MOHESH NARAIN MOONSHI v. TARUCK NATH MOITRA.

of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the Plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the Defendant is in possession."

The present suit is, therefore, within the meaning of the *Limitation Act* of 1871, a suit "to set aside an adoption." The adoption was made by *Tripura Soondari*, on the alleged authority of the anumati patra by her husband, in the year 1851, with all the usual ceremonies, and was duly reported to the Government Collector. Thereafter, on the 20th of February, 1852, it was ordered—on a petition by *Nobodoorga*, the mother of *Shib Narain*, and his two widows, in which it was stated that *Nobodoorga*, "together with the said two sons," had taken possession of all the moveable and immoveable properties of the deceased —that the names of *Nobodoorga*, of *Hurro Soondari*, as mother of *Mohesh Narain*, minor, and of *Tripura Soondari*, as mother of *Girish Narain*, minor, should be registered in respect of the deceased's property. After the death of *Nobodoorga*, the two widows, describing themselves as mothers of their respective minor sons, presented an application under the Act XX. of 1841 to obtain a certificate of title for the administration of their late husband's estate, which would enable them to sue all debtors to the estate. In this petition they stated that their two minor sons had got the right of inheritance in all the properties, moveable and immoveable, of the deceased, and that they, the petitioners, became entitled thereto as guardians on behalf of the said two minor sons, and were in possession on their behalf; and in 1855 a certificate was granted to them accordingly "as guardians of the said minors," under the authority of which they thereafter administered the estate. It need only be further stated, that from the time of his adoption in 1851 the Defendant lived with his mother, *Tripura Soondari*, as the adopted son of her late husband, till she herself died in 1884, being for about thirty-three years; that down to 1869, a period of eighteen years, the two widows and their adopted sons (the Plaintiff and the Defendant) lived in family together; and

that even after that date down to 1880, the collections of rents and income of the deceased's estates were made jointly by the widows, and divided in equal moieties, the widows having their respective sons in family with them. It is thus quite clear—apart from any question of possession, and whether the possession for so long a period of time as elapsed at *Tripura Soondari's* death, was truly the possession of her son, for whom she acted as guardian, and after he attained majority as his manager, or was possession by herself in virtue of a right of liferent conferred by her husband's anumati patra, and in any view—that the right of the Defendant to the *status* of an adopted son of *Shib Narain* was openly and constantly asserted, not only in all actings connected with the estates, but also in his daily life in family with the Plaintiff, who, indeed, in many ways acknowledged or acquiesced in the assertion of this right.

The Plaintiff came of age in 1861–62, and the Defendant in 1862–63. The period of twelve years after the Defendant's adoption expired in 1863, and eight years more had elapsed when the *Limitation Act* of 1871 was passed. By sect. 1 of that statute, which received the assent of the Governor-General on the 24th of March, 1871, it was provided that the clauses of limitation should not come into force until the 1st of April, 1873. The Plaintiff had thus upwards of two years after March, 1871, within which he might have brought his suit to set aside the adoption, and had notice under the statute that the period of limitation of twelve years from the date of the adoption would be applicable on the expiry of that time. Accordingly, on the 1st of April, 1873, no such suit having been raised, the Plaintiff's right of action was barred.

It was suggested that, the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to, as necessary to save the limitation, being described as one "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place." It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the Plaintiff would thereby take

J. C. 1892 MOHESH NARAIN MOONSHI v. TARUCK NATH MOITRA.

any advantage. But the statute of 1877, in its second section, provides as follows:—

"All references to the Indian *Limitation Act*, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained, shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

It is clear that, on the 1st of April, 1873, the Plaintiff's suit was barred by limitation under the Act of 1871, and the Act of 1877 could not revive the Plaintiff's right so barred—a point which was indeed decided, in regard to the *Limitation Acts* of 1859 and 1871, in the case of *Appasami Odayar* v. *Subramanya Odayar* (1).

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be dismissed, and the Appellant will pay the costs of the appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitor for Respondents: *J. F. Watkins.*

J. C.* 1892 Dec. 7, 8, 16. 1893 Jan. 30.

SYED ASHGÁR REZA AND ANOTHER . . PLAINTIFFS;

AND

SYED MEDHI HOSSEIN KHAN AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Concurrent Findings of Fact—Practice.

Where there were concurrent findings of fact that a purchase by a Mahomedan in the name of his sons was for their benefit, and that beneficial enjoyment by the sons had been proved, and destroyed the presumption of benami, *held* that such findings would not be questioned by the Committee.

A Mahomedan having directed property to be transferred from a benamidar to his wife, the first Court found that he did so intending the latter to hold for her own benefit, while the High Court found that the

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, LORD SHAND, and SIR RICHARD COUCH.

(1) Law Rep. 15 Ind. Ap. 167.

wife was to hold in the first instance as substituted benamidar, and subsequently for her own benefit, the findings as to possession by the transferee before the death of the donor being concurrent :—

Held, that this was not sufficient concurrence to prevent further inquiry, and that on the evidence the view of the first Court was to be preferred.

APPEAL from a decision of the High Court (May 26, 1888), affirming a decree of the Subordinate Judge of *Purnea* (Sept. 13, 1886), which dismissed the Appellants' suit.

The facts are stated in the judgment of their Lordships.

Doyne, and *C. W. Arathoon*, for the Appellants, contended that the original purchase by *Ahmed* of the putni having been in the names of two of his sons, the presumption was that such purchase was benamee. There was no evidence or presumption of an intention to benefit the two sons to the exclusion of the others. An allegation to that effect must be proved by sufficient evidence. Under Mahomedan law a gift must be followed by possession; here there was not even registration, though Act XX. of 1866 was in force. As to the interference by the Board with concurrent findings, see *Moulvie Sayyud Uzhur Ali* v. *Bebee Ultaf Fatima* (1). As to evidence in benamee cases, see *Imambandi Begum* v. *Kumbeswari Pershad* (2); *Dhurm Das Pandey* v. *Mussumat Shama Soondri Debiah* (3); *Gopee Krist Gosain* v. *Gungapersaud Gosain* (4). The *onus* is always on the person who alleges that the ownership of benamee property is not in the person who finds the purchase-money. Here some express act of the father must be shewn. Upon the point as to delivery of possession being necessary to render a gift by a Mahomedan operative, reference was made to *Sheikh Bahauder Ali* v. *Sheikh Dhoman* (5); *Ranee Khujoormonissa* v. *Mussamut Roushun Jehan* (6).

With regard to the eleven gundahs, the ruling of the High Court finds, in accordance with the Appellants' case, that the transfer to the wife was merely from one benameedar to another. It thereby reverses, it is submitted rightly, the finding of the first Court that the transfer was to the wife beneficially.

(1) 13 Moore's Ind. Ap. Ca. 232, 242, 246.
(2) Law Rep. 13 Ind. Ap. 165.
(3) 3 Moore's Ind. Ap. Ca. 229, 240.
(4) 6 Moore's Ind. Ap. Ca. 53, 72.
(5) 1 Sel. Rep. 250, and see also note at p. 253.
(6) Law Rep. 3 Ind. Ap. 291, 307

J. C. 1893 SYED ASHGAR REZA v. SYED MEDHI HOSSEIN KHAN

There is no foundation in the evidence, and it is inconsistent with the case made by both parties, that the wife, having originally taken as substituted benameedar, was afterwards placed in the position of beneficial owner. Such transaction being one of gift would not have been valid by Mahomedan law, and it rests merely on the surmise of the High Court.

Cowie, Q.C., *Graham*, Q.C., and *Branson*, for the first five Respondents, contended that there were concurrent findings to this effect; that neither of the properties in dispute formed at the time of the death of *Ahmed Reza* a portion of his estate, so as to descend to and be divisible amongst his heirs. As to the putni property, those findings were distinct that the purchase was not made benamee, but as an endowment or provision for the two sons. As to the eleven gundahs, the case of the Respondents was that the finding of the first Court was right, that the transfer to *Afzulunnissa* was to her beneficially at the outset. There was no ground for reversing that decision, and the evidence which obliged the High Court to hold that the property had all along been treated by *Ahmed Beza* as first his wife's property and then her sons', was confirmatory of the first Court's finding. Limitation was also relied upon. Reference was made on the subject of delivery of possession to *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum* (1); *Ameeroonnissa Khatoon* v. *Abedoonnissa Khatoon* (2).

Doyne, replied.

1893 Jan 30

The judgment of the High Court was delivered by

LORD HOBHOUSE:—

This suit relates to certain interests in the pergunnah of *Surjapore*, which appears to be an estate of great value. It was formerly in the sole ownership of a Mahomedan gentleman named *Raja Fakruddin*. After his death, and after much litigation, it became divided into moieties, one known as *Kishengunge* and the other as *Khagra*. These moieties have in their turn been the subject of numerous lawsuits and arrangements, and have been

(1) 11 Moore's Ind. Ap. Ca. 517, 544. (2) Law Rep. 2 Ind. Ap. 87, 98.

split up into a great variety of interests. The history of the property is very complicated, and it has taken up a great deal of attention in the Courts below, and swells the bulk of the record. But for the present purpose it is not necessary to go further back than the purchase by one *Ahmed Reza* of the interests now in dispute. They are called the 11 gundahs, and the putni mahal, and each of them is a part of the *Kishengunge* moiety.

Ahmed Reza had two wives. In the year 1854 he married *Afzulunnissa*, then a very young girl, though capable of bearing children. She brought him two sons named *Hyder* and *Sufdar*, and one daughter, *Munni Bibi*. All are living, and are Defendants in this suit. In the year 1859 *Ahmed* married *Rowshun Jehan*, a lady who was entitled to valuable interests in the *Khagra* division of pergunnah *Surjapore*. She brought him four sons, of whom two are dead; the other two are Plaintiffs in the suit, and the eldest, *Asghur*, is the present Appellant.

Afzulunnissa died in April, 1860, *Ahmed* in April, 1870, and *Rowshun* in the year 1874. The suit was brought in April, 1885. In it the sons of *Rowshun* claim that the properties in dispute were part of the inheritance of *Ahmed*, in which they are entitled to share. The children of *Afzulunnissa* are Defendants on the record; but the person who is really resisting the claim is the Defendant *Lutf Ali Khan*. He states that in or about the year 1883 he purchased the properties of *Hyder* and *Sufdar*, who were then recorded as proprietors in the Collector's books, and were in possession. And he maintains that they were the true and lawful, as well as the ostensible, owners thereof; and that the Plaintiffs have no title. The plaint charges collusion between *Lutf Ali* and the sons of *Afzulunnissa*; but the view of both Courts is that the whole family are in combination against *Lutf Ali*.

On the 11th of February, 1851, one *Kasim Ali* was declared the purchaser of the 11 gundahs at an execution sale. On the 8th of April, 1854, *Kasim Ali* effected the registration of an ikrarnama, executed by himself under date of the 21st of August, 1852, in which he declared that the purchase-money was provided by *Afzulunnissa*, and that she was the real owner of the property. It has been found that the date assigned to the deed is false, and

J. C. 1893

SYED ASHGAR RFZA v. SYED MEDHI HOSSEIN KHAN.

that the true date is that of the registration. This was about the time of *Ahmed's* marriage with *Afzulunnissa*—whether before or after is not clearly shewn, nor does it seem to be important. The statement as to the source of the money is also false. *Kasim* was the agent of *Ahmed*, who found the money. *Afzulunnissa* was very young, "a mere child" the High Court says, and wholly without property. *Lutf Ali* naturally enough has striven to support the statements of the ikrarnama, but both Courts have found that issue against him. It must be taken that *Kasim* was benamidar and *Ahmed* the real owner of the property before the 8th of April, 1854. On that day the formal and ostensible ownership was transferred by *Ahmed's* orders from *Kasim* to *Afzulunnissa*. Whether that transfer merely changed one benamidar for another, or gave a beneficial title to the property, is the first question on this part of the case.

It does not appear that *Afzulunnissa* ever had any separate possession or enjoyment of this property, which was managed by *Ahmed* along with his own larger shares till long after his wife's death. She died in 1860, being still quite a young woman. Her heirs were her mother, her husband, and her children. If the dispute had arisen then, and if it had appeared that *Ahmed's* intention in effecting the transfer to her was to benefit her, the Court would have had to consider the question discussed at the Bar, viz., how far the Mahomedan law requires change of possession to perfect a gift by a husband to a wife of very tender years. But the dispute did not arise till after *Ahmed's* death, and the Courts have been guided to their conclusions mainly by the events which took place between the death of *Afzulunnissa* and that of *Ahmed*.

In May, 1860, a suit was instituted in the name of *Ahmed's* second wife, *Rowshun*, to recover interests claimed by her in pergunnah *Surjapore*. This suit was really promoted by *Ahmed* himself, and conducted at his cost. It related to the *Khagra* division of the pergunnah. But the amount and details of the Plaintiffs' share are described by way of subtracting other shares and interests from the 16 annas of the pergunnah. In this way there is deducted, "share of *Raja Syed Ahmed Reza*, 6 annas 1 gundah, and the right purchased by *Syed Hyder Reza* and

Sufdar Reza, minor sons of *Afzulunnissa*, deceased, purchaser of 11 gundahs, in all 6 annas 12 gundahs." The 6 annas 1 gundah belonged to *Ahmed* prior to 1851. To speak of *Afzulunnissa* and her sons as both being purchasers of the 11 gundahs was inaccurate; but that does not affect the value, whatever it may be, of the recognition of their title. On this and other documents, the High Court observe that there was no reason why on *Afzulunnissa's* death her name should not have been dropped altogether, if the property really belonged to *Ahmed*, and if he wished to treat it as his own. The property he held in his own name was many times larger than the largest amount of the claims against him.

On the 10th of January, 1863, *Lala Kali Sahai*, another agent of *Ahmed*, executed a deed purporting to sell to *Hyder* and *Sufdar* a share of the 11 gundahs, and of other interests in pergunnah *Surjapore*, acquired and left by *Afzulunnissa*. The share is described as "the entire share of *Bibi Mehrunnissa*, mother of the late *Rani Afzulunnissa* aforesaid, as mother's share." This share, it is stated, was purchased by *Lala Kali Sahai*, at an execution sale, in pursuance of a decree passed against *Mehrunnissa*. How the money was provided does not appear. Nobody doubts that the whole transaction, whether substantial or only formal, proceeded from *Ahmed*. But the High Court decided that the proceedings recited in the deed were real proceedings, there being no evidence to the contrary. If so, *Ahmed* recognised title in *Mehrunnissa* as heir of *Afzulunnissa*, and, if money was paid, it was paid for getting that title in.

In the year 1867 came the transaction of the putni. That estate had been granted by *Ahmed* and his brother *Mahomed* to two persons, against whose representatives decrees were executed, one in February and one in June, 1867. The purchases were made ostensibly in the name of *Mehrunnissa*, guardian and executrix of *Hyder* and *Sufdar*, minor sons of *Ahmed*, and the sale deed was in favour of *Hyder* and *Sufdar*. With respect to this purchase, also, it has been disputed who found the purchase-money, and the dispute has been decided the same way as in the case of the 11 gundahs. It must be taken that *Ahmed* found it. Still remains the question whether he intended his sons to

J. C. 1893

SYED ASHGAR REZA v. SYED MEHDI HOSSEIN KHAN

be benamidars or beneficial owners. If the latter, possession is not as between father and infant son necessary to perfect the gift. But the possession of the property is important as evidence, and is one of the points much disputed in the case.

On the 1st of November, 1869, *Ahmed* being ill, but quite competent for business, handed to Mr. *Campbell*, who is termed by the Subordinate Judge joint magistrate and divisional officer of the place, a petition relating to his property. Mr. *Campbell* received it, signed it, and had it recorded in the collector's office. He commences thus:—

"This is a petition filed in person by *Raja Syed Ahmed Reza*, zemindar of pergunnah *Surjapore*.

"Sir,—For more than a month I have been suffering from a sore in the mouth. Every one living is subject to death, and hence it is proper to make the under-mentioned representations to the Collector of *Bheriadangi*.

"The facts are as follows: That foresightedness and prudence require that the paternal and ancestral property should be looked after, and the name and prestige of the family should be preserved during my lifetime. Whereas in pergunnah *Surjapore* a 6 annas 1 gundah share of the zemindari, besides resumed and unresumed milik lands, exclusively belongs to me, and an 11 gundahs share of the zemindari of pergunnah *Surjapore* and the putni mehals, and the resumed and unresumed milik lands is the purchased right of the minor sons, *Syed Hyder Reza* and *Syed Sufdar Reza*, and [out of] a 1 anna 13 gundahs 3 cowris 1 krants 2½ dunts share of the zemindari out of 16 annas, 8 gundahs, have been decreed to *Rani Rowshun Jehan*, it seems proper that proper management and settlement of those properties should be made in the manner following."

He then goes on to give directions for management after his death by the Court of Wards through a surburakar or manager. As regards the properties "exclusively belonging to me," his design is that each of his six minor sons shall have an equal share with the others, and that his daughter shall have an allowance. As regards the properties now in dispute, his directions are that the services of *Kishen Chunder Chowdhry* and another shall be retained, and that the profits shall be remitted to

Mehrunnissa, the guardian and executrix of the minors *Hyder* and *Sufdar*, and applied for their benefit.

It is not contended that this document was intended to operate, or can operate, as a gift *inter vivos* or as a will. But the Court received it as a declaration by *Ahmed* against his own interest, and used it as throwing a strong light on his intentions in his prior dealings with the properties.

Ahmed made no further disposition of his property, but died intestate, leaving his widow *Rowshun* and his seven children surviving him. Soon after his death disputes arose between the two branches of the family, and *Rowshun* and her sons left the family house at *Kishengunge* to reside elsewhere in the neighbourhood. The Plaintiffs allege that they were dispossessed of the properties in dispute by their elder brothers in July or August, 1870; but the Courts have concurred in rejecting that allegation as unproved. There were disputes between *Mehrunnissa* on one side and *Rowshun* on the other as to the true ownership, but they were not brought into litigation. It is common ground that *Hyder* and *Sufdar*, or *Mehrunnissa* on their behalf, were in possession as early as August, 1870, and that they or their vendee have ever since remained in possession.

The plaint was filed on the 6th of April, 1885. The main defences set up were that the Plaintiffs had no title, and that the suit was barred by time. Both depend upon the views taken of *Ahmed's* intentions and of his actual dealings with the properties. If it were clearly established that his wife and sons were merely benamidars and he the true owner up to his death, the time since elapsed would, owing to the minority of the Plaintiffs, not be sufficient to bar the suit. Accordingly, the subordinate Judge addressed himself to the questions of title and possession, and the High Court took the same course; and as both Courts, upon those issues, came to a conclusion adverse to the Plaintiffs, they rested their decrees on that ground, and gave no formal decision upon the point of limitation. They did, however, elaborately discuss the question of fact, whether or no *Afzulunnissa's* sons were put into possession in *Ahmed's* lifetime, and found that they were. That fact, when found, was used by the Courts as evidence of the Defendants' title. But it is

J C. 1893

SYED ASHGAR REZA v. SYED MEDHI HOSSEIN KHAN.

obvious that it might have been used in a more direct way to support the defence of limitation. If during *Ahmed's* lifetime he was out of possession and his sons in, time began to run in their favour against him, and the minority of his heirs will not give them further time to sue.

It was earnestly contended by Mr. *Cowie* that the whole decision turns upon questions of fact, and that there are concurrent findings in favour of the Defendants, which ought not to be disturbed, or indeed examined into any further. Their Lordships agree that there is no substantial question of law in the case; but in order to see how far the Courts have concurred in their view of the facts, it is necessary to examine precisely what their findings are, and to distinguish between the two properties in dispute. It will be convenient to take the putni first.

The Subordinate Judge, commenting on a number of facts, finds that the purchase of the putni in the names of the sons was for their benefit; that *Ahmed Reza* intended at the time of the purchase, and thenceforward till his death, that the putni should be theirs; that *Hyder* and *Sufdar* have derived benefit therefrom for about twenty years; and that their beneficial enjoyment destroys the presumption of benami. He states the duration of enjoyment loosely, and exaggerates it somewhat; but the former part of his judgment shews an accurate perception of the actual dates. The main facts on which he relies are, *Ahmed's* petition of 1869, *Rowshun's*, or rather *Ahmed's* plaint of 1860, and a number of zemindari papers shewing that separate accounts were kept of the putni and of *Ahmed's* own 6 annas 1 gundah. He also states that the Plaintiffs' witnesses are not truthful; and he comments adversely on the fact that *Kishen Chand Chowdhry*, who is mentioned in *Ahmed's* petition as an important servant of the estate, and who is in the service of the Plaintiffs, was not called by them, though the Defendants frequently requested them to call him.

The High Court find in terms "that the putni was acquired . . . by *Hyder* and *Sufdar*, and was always treated as their exclusive property." They rest their judgment mainly on the documents relied on by the Subordinate Judge and on the sale deed of 1863.

Their Lordships have then the first Court and the Appellate Court concurring in their conclusion as to a question of fact, and upon nearly the same considerations. The question moreover is one for the decision of which familiarity with native families and estates, and with the practice of benami purchases, confers great advantages. Of all classes of questions this would be one of the last in which this Committee could be induced to depart from the wholesome general practice of abiding by concurrent decisions of the Courts below.

The case of the 11 gundahs is not so simple. The Subordinate Judge finds that *Ahmed* intended the transfer to *Afzulunnissa* to be for her benefit, and that she and her sons afterwards derived benefit from it, for about thirty years prior to the suit. He considers that *Afzulunnissa* became owner at the date of the ikrarnama, and he connects it, but only by conjecture and by proximity of time, with her marriage.

The High Court, on the other hand, think that the transfer to *Afzulunnissa* was simply a transfer from one benamidar to another. But they are so pressed with the evidence of title and of possession furnished by the plaint of 1860, the deed of sale of 1863, the petition of 1869, and the zemindari accounts, which have been mentioned before, aided in their opinion by the form of a rent suit of September, 1869, in which *Mehrunnissa* and her two grandchildren are joined with *Ahmed* as zemindars, and by the long undisturbed enjoyment after *Ahmed's* death, that they cannot resist the conclusion that in some way the property was transferred before his death. They connect the transfer with *Ahmed's* second marriage; and their finding is that in or about the year 1859 the property was given by *Ahmed* to *Afzulunnissa* or her sons, and was thenceforward acknowledged and dealt with by him as their property.

Their Lordships cannot find here any such concurrence as would justify them in abiding by the ultimate decision in favour of the Defendants as something which ought not to be inquired into, and they have accordingly heard the case fully argued as to the 11 gundahs. They are bound to say that they cannot find sufficient evidence of any gift to *Afzulunnissa* in the year 1859, when no overt act was performed. For a gift in the year

J. C. 1893

SYED ASHGAR REZA v. SYED MEDHI HOSSEIN KHAN.

1854, when the ikrarnama was executed, there is to say the least a very plausible case. To the considerations relied on by the Subordinate Judge, two may be added which assumed some prominence during the argument here.

One is that no explanation can be given why the ikrarnama should have been executed at all, unless there was to be a change of ownership. Mr. *Doyne* frankly stated that he could not think of any, and their Lordships do not find any suggested in the Lower Courts. Mr. *Doyne* thought it sufficient to argue that, as the purchase-money came from *Ahmed*, the law would presume that he was the true owner. So it would as between him and *Kasim*. But as between him and *Afzulunnissa* the case is quite different. *Ahmed* was the absolute owner of an estate held for him by a benamidar. In that state of things he marries, and, somewhere about the same time, directs his benamidar to effect a transfer of the formal and ostensible title to the lady. Why should he change his benamidar? Why should he take as benamidar his very young wife instead of his professional agent? The Subordinate Judge says that to make benami in the names of wife or sons is never considered to be safe. Whether safe or not, nobody suggests that it was a probable or desirable change to make. The transaction is quite intelligible on the theory of a gift, but otherwise it remains an enigma.

Again, Mr. *Doyne* urged very strongly that *Ahmed* was alarmed at the claims which were being pressed against him, and, therefore, had a strong motive for setting up a benamidar. The High Court, as above mentioned, have been at the pains to shew that there could be no such alarm in 1860 or afterwards. But supposing that it existed in 1854, what is the inference? That *Ahmed* would be content to interpose a sham title of a flimsy description between himself and his creditors? Or that he would make a real provision which would save his wife in case his own fortunes were wrecked? To their Lordships it seems that the second alternative is the more probable. They do not place much reliance on these conjectures, which are very speculative, but it seems to them that, however the case is presented, the theory of gift in 1854 affords a more probable explanation of the facts than the theory of a change of benamidar.

From the above observations it will appear that their Lordships incline to the view taken by the Subordinate Judge of the true intention of *Ahmed* in causing *Kasim Ali* to execute the ikrarnama of 1854. And then the possession by *Afzulunnissa's* sons, which is clearly found by both Courts to have existed some time, though the precise beginning of it is uncertain, prior to the death of *Ahmed*, may be sufficient to satisfy the rules of Mahomedan law.

But, after all, there remains a good deal of obscurity on the question of title. Their Lordships prefer to rest their decision on the conclusions of the Courts with respect to possession, as to which they had reasonable evidence. *Ahmed*, being out of possession, might have brought a suit to recover it, and to have it declared that the formal title vested in *Afzulunnissa* and her successors was only benami for himself. From such evidence as their Lordships have of his wishes, he never would have done so; but, however that may be, the time for bringing a suit began to run in his life, and after twelve years became an absolute bar to him and his heirs.

Their Lordships will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss the appeal with costs.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitor for Respondents: *J. F. Watkins.*

J. C.* 1891 June 18, 19, 24, 25; July 1. 1892 Nov. 19.

SHEKH SULTAN SANI . . . . . PLAINTIFF;

AND

SHEKH AJMODIN . . . . . DEFENDANT.

AND THE REVIVED APPEAL.

ON APPEAL FROM THE GOVERNOR IN COUNCIL OF BOMBAY.

Grants by Treaty—Saranjam and Inam Tenures—Political Tenure—Jurisdiction of Civil Tribunals.

Held, with regard to both the saranjam and inam tenures in suit, that having been originally granted by treaty to be held on a political tenure, they had continued to be so held, with the result that they were resumable at the pleasure of the Government. Such right of resumption had been recognized by legislation (see *Bombay Act* VII. of 1863). It accordingly rested with the Government to regrant the same at its discretion on the death of their holder, and it was not within the competency of any legal tribunal to review its decision.

APPEAL with the permission of the Government of *Bombay* from a judgment of the Governor in Council, termed a resolution in the Political Department (25th of April, 1887), varying a decision of the Court of the Agent for Sardars in the *Deccan* at *Poona* (8th of June, 1886). The proceedings were held under *Bombay* Regulation XXIX. of 1827. The suit was brought to set aside the acts of the *Bombay* Government, which upon the death of Shekh *Khan Mahomed*, a sardar of the second class, had recognised as his successor the Respondent, and had placed him in possession of certain saranjams or jaghirs and inam lands held by *Khan Mahomed* up to his death. The Plaintiff claimed to be entitled to them as son and heir of the deceased, and also general devisee under his will. The fact of the will was undisputed.

The Agent for the Sardars held that the Plaintiff was the only son of *Khan Mahomed*, and as such was entitled to share in all his property in respect of which the Court was competent to pass

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

any decree. As to the saranjams he considered that they were completely at the disposition of the *Bombay* Government, and that the Government would not be bound to respect any decree which he might pass. As to the other property he decreed to the Plaintiff that share to which he was entitled as only son by the Mahomedan law. On appeal the Governor in Council held that the Plaintiff was not the son of *Khan Mahomed*, and that as regards the larger part of the property claimed *Khan Mahomed* had, by virtue of certain proceedings of the *Bombay* Government, been deprived of any heritable or descendible estate. It was admitted, however, that the Plaintiff was the devisee of *Khan Mahomed* under his will, and effect was given to this will in his favour, to the extent permitted by Mahomedan law, in respect of all property of the testator which was not affected by the above-named proceedings of Government.

The material portion of the resolution of the *Bombay* Government was as follows :—

The great mass of the property which forms the subject of the suit was held by *Khan Mahomed's* ancestors under grants of old date, which merged into a regrant under the agreement concluded with Shekh *Mira Waikar*, dated the 3rd of July, 1820, which will be found at page 377 of the 4th vol. of *Aitchison's* Treaties. By this agreement the "jaghirs, &c.," were restored to Shekh *Mira*, and the "Inam villages, watans, and other allowances" were continued to him. Upon *Khan Mahomed's* death, the Government, in accordance with the decision already referred to, resumed the jaghir or saranjam, and after a while regranted it to the Defendant, *Ajmodin*. There is no doubt whatever that the Government had a perfect right to do this, and that its action cannot be questioned. It is settled law that the Government may resume jaghirs or saranjams whenever it pleases, and that the civil Court cannot question such action. Even therefore if the resumption of a saranjam were wholly unjustifiable, it would be none the less valid; but certainly no resumption could be more justifiable than one made as a punishment to the Saranjamdar for palming off upon Government a spurious son as his heir. This has hardly been disputed; and the argument at the Bar has been mainly directed to the question

J. C. 1892

SHEKH SULTAN SANI v. SHEKH AJMODIN.

whether the resumption and regrant to *Ajmodin* of the inam, as distinguished from the saranjam, can be upheld as an act legally within the competency of Government. Now, it certainly appears from the old *sanads* that the inams were originally held on a somewhat different tenure from the saranjams. They seem to have been granted for maintenance and as a reward for past service, rather than on condition of future service. The same distinction may perhaps have been intended, though it is not very clear in the agreement of the 3rd of July, 1820. It is also evident that, after it had been determined to resume the saranjam, Government did not for some time contemplate a resumption of the inam, but rather intended that all claims to the inam should be adjudicated on in the usual course by the civil Court. But in 1876 Government finally determined to resume the inam, and regrant it to *Ajmodin*: and the question is, not whether this determination was consistent with the advice of all its officers, or with its own previous views and opinions, but whether its action was within the powers vested in it by law. Now, looking to the provisions of Sched. B, rule 10 of Act XI. of 1852, to sect. 1, clause 2, and sect. 16 of *Bombay Act* II. of 1863, and to sect. 2, clause 2, and sect. 32 of *Bombay Act* VI. of 1863, it must, in the opinion of the Governor in Council, be held that Government has the power to resume, on political considerations, any property which is held on political tenure; and that it is for Government to determine in every instance whether the tenure is political. This being so, the question is whether Government did, in 1876, resume the inams of the *Waikar* family on the ground that they were held on political tenure. Now, the decision of Government is contained in its Resolution No. 6836, of the 6th of November, 1876, which in its preamble sets forth a memorandum of the alienation settlement officer, containing his opinion that "as Government have sanctioned the adoption" (*i.e.* of *Ajmodin*) "the whole estate, intact, saranjam and inam, as restored after the war under the treaty of the 3rd of July, 1820, is continuable as a guaranteed estate to the adopted son as the head of the family, and should be entered in the accounts accordingly, the same as all other treaty estates of mixed saranjam and inam"; and then the reso-

lution is passed in the following terms: "The suggestions of the alienation settlement officer are approved, and should be carried out." So that Government adopted the view of the alienation settlement officer, and that view clearly was that, under the terms of the treaty of 1820, and other similar treaties, a mixed estate of saranjam and inam is all held on the same political tenure, and ought to pass intact to the person whom Government may recognise as the head of the family. This view may have been right or wrong (and looking to the terms of the treaty of the 3rd of July, 1820, the Governor in Council would find it difficult to say that it was wrong); but, at any rate, as it was adopted by Government as the ground of its action, it does not appear open to any Court to dispute it.

The facts of the case and the proceedings are stated in the judgment of their Lordships.

Doyne, for the Appellant, contended that the Agent for Sardars in the first instance was wrong in rejecting the claim relating to the saranjams, though right in his ruling as regards the inams and the other property. But the Government on appeal deprived him of everything except what it considered to be within the disposing power of *Khan Mahomed*. He contended, with regard to the saranjam properties, that they had been recognised and confirmed as hereditary estates of Shekh *Mira* by the Government of the *East India Company* in 1819 and 1820. Reference was made to the treaty of the 25th of September, 1819, *Aitchison's* Treaties, vol. 6, No. 2, arts. 1, 7, between the company and the Rajah of *Satara*; and to an agreement made with Shekh *Mira* II., dated the 3rd of July, 1820, ibid. vol. 6, p. 78. It was contended that thereafter the Government did not possess or retain any power to alter the right of succession to those properties according to the rule of primogeniture. As regards the resolution of the Government of the 5th of April, 1860, to the effect that, even if *Khan Mahomed* should leave a legitimate son, the saranjams will not be continued to him, it was contended that it and all subsequent proceedings of the Government in derogation of that son's right of succession were beyond the scope of the Government's authority and illegal. Reference was made to *Ramchandra*

J. C. 1892

SHEKH SULTAN SANI v. SHEKH AJMODIN

Mantri v. *Venkatrao Mantri* (1), and *Premshunkar Raghunathji* v. *Government of Bombay* (2). Saranjams, no doubt, are resumable at the pleasure of the Government, unless the Government has by its own act made them hereditary: see *Dosibhai* v. *Ishwardas Jagjiwandas* (3).

As regards the inam tenures and other private properties of *Khan Mahomed* which were not comprised in the resolution of the 5th of April, 1860, they, on his death, descended by law to his heir or heirs-at-law, and the Government could not by its resolution of the 27th of March, 1874, recognising the Respondent as the head of the family, to whom the saranjam should be continued, affect the rights of those who were entitled to the inams by the ordinary law of inheritance. Reference was made to the *Inam Act* XI. of 1852; *Bombay Act* II. of 1863, sect. 2; *Madhavrar Manohar* v. *Atmaram Kashar* (4). Reference was also made to a judgment on the evidence in the former case: *Gujju Lal* v. *Futtehdal* (5), and to *Naranji Bhikhabhai* v. *Dipa Umed* (6). Upon the question of legitimacy the evidence was sufficient to establish the Appellant's case, regard being had to the strength of the presumptions in its favour according to Mahomedan law: see *Ashrufood Doula Ahmed Hossain Khan* v. *Hyder Hossein Khan* (7); *Nawab Muhammad Azmut Ali Khan* v. *Mussumat Lalli Begum* (8).

Finlay, Q.C., and *Mayne*, for the Respondent, contended that on the evidence the Appellate Court was right in holding that the Appellant had not made out his title as son and heir to *Khan Mahomed*. The law of inheritance applicable to this case is as laid down in *Gulabdas Jugjiuandas* v. *Collector of Surat* (9), recognised in *Dosibhai* v. *Ishwardas Jagjiwandas* (3). The Appellant's right, however, to both saranjams and inams depends, in the first instance, on the treaty of the 3rd of July, 1820, which was of a political character, is not subject to interpretation by the Civil Courts, but was within the exclusive interpretation of

(1) Ind. L. R. 6 Bomb. 598.
(2) 8 Bomb. H. C. R. (A.C.J.) 195, 201.
(3) Law Rep. 18 Ind. Ap. 22.
(4) Ind. L. R 15 Bomb. 519.
(5) Ind. L. R. 6 Calc. 171.
(6) Ind. L. R. 3 Bomb. 3.
(7) 11 Moore's Ind. Ap. Ca. 94.
(8) Law Rep. 9 Ind. Ap. 8.
(9) Law Rep. 6 Ind. Ap. 54.

the executive authority. The Government recognise that treaty as conferring only a life tenure as to both saranjams and inams. The tenure of those was of a political character. The title was as Government grantee; and although the grantee's son succeeded at his death, the son's title was not by right of descent, but the Government selected him because of his descent. What the Government did, having conquered the territory, was to parcel out the tenures between the Rajah of *Satara* on the one side, and the jaghirdars on the other. To the latter their titles were guaranteed, and the rajah had his title to the raj subject to respecting the title of the jaghirdars. The result was that the jaghirs and the inams were to be enjoyed as before by holders whose title was personal and military in its origin. They obtained no more than life tenures. Saranjams, moreover, are by their own character, and by the law and custom of *India*, at the absolute disposal of the Government. The particular saranjams in this case are shewn to have been held on a political and not an hereditary tenure. The same principle applies to the inams, which both before and after the treaty of 1820 were held for life only; and the Court of Directors in the transaction of 1842 had no intention to alter the character of either the one or the other. Reference was made as to political tenures to Act XI. of 1852, and to sects. 10 and 11 of Sched. B; to *Bombay Act* II. of 1863, sects. 1, 16 (*c*); Act VII. of 1863, sect. 2, clause 3; sect. 32 (*c*).

Doyne, replied.

The judgment of their Lordships was delivered by

LORD HANNEN:—

The Plaintiff, Sultan *Sani*, claims to be the son of Shekh *Khan Mahomed*, who died on the 31st of December, 1872, and as such son to be entitled to certain properties alleged to have been held by *Khan Mahomed* by a tenure known as saranjam, and certain other properties alleged to have been held by a tenure known as inam. The nature of these tenures will be considered presently.

The Plaintiff also claimed the property as devised to him under the will of *Khan Mahomed*.

J. C.
1892
SHEKH SULTAN SANI v. SHEKH AJMODIN.

The suit was one in the Court of the Agent for Sardars, a tribunal created in 1827 (*Bombay* Regulation XXIX. of 1827) for the trial of suits against certain *Deccan* sardars, an appeal being given to the Governor in Council of *Bombay*, and from him to the Queen in Council.

In this suit the Plaintiff sought to recover possession from the Defendant *Ajmodin* (the predecessor of the present Respondents) of the saranjam and inam lands of which (as the Plaintiff alleged) the Defendant had been put into wrongful possession by the *Bombay* Government after the death of *Khan Mahomed*.

In answer to this suit it was contended by the Defendant that the Plaintiff was not the son of *Khan Mahomed*; and, secondly, that the tenure of the lands claimed was such that the Government was entitled on the death of *Khan Mahomed* to resume them and assign them to whom it pleased.

The title of the Plaintiff under the will of *Khan Mahomed* was not disputed as to the property of the testator over which the Government had not such a disposing power.

The Agent for Sardars held (the 8th of June, 1886) that the Plaintiff is the son of *Khan Mahomed*, but that the saranjams were completely at the disposal of the Government. As to the other lands, which he distinguished as inam, he held that the Plaintiff was entitled under the Mahomedan law to recover as only son of the testator.

On appeal to the Governor in Council, His Excellency in Council held that the Plaintiff was not the son of *Khan Mahomed*, and that the Government had power not only to resume the saranjam, but also the so-called inam property, and to assign them to whom it pleased.

From this decision the present appeal is brought to Her Majesty in Council.

The Agent for Sardars and the Governor in Council have both held that the saranjam lands were of such a tenure that the Government was entitled to resume them and to re-grant them to whom it pleased. Their Lordships propose to consider this question in the first instance.

"Saranjam" is stated in *Wilson's* Glossary to be an "assignment of lands or their revenue by the State for the support of troops."

"Mokasa," a word which will be found in several of the documents hereinafter referred to, appears to have a meaning nearly equivalent to that of saranjam. It is defined as "villages or lands, or a share in the rule over them, and revenue arising from them, granted on condition of military service or in inam."

"Inami" is stated by *Wilson* to mean "grants of land held rent free, and in hereditary and perpetual occupation."

The history of the property to which this suit relates is as follows:—

In 1708, one Shekh *Meeran* (or *Mira*) was in the service of the Rajah of *Satara*. For assistance rendered to the rajah "he received the inam village of *Pasarni*, a pension of Rs.1,800 monthly, and was raised to the rank of a commander of sixty horses, for the maintenance of which he held mokasa amals (meaning 'share of revenue') to the amount of Rs.40,000. The pension ceased with the first Shekh *Meeran*, and the mokasa has since fallen off to about Rs.18,000, which, with *Pasarni*, is still enjoyed for the performance of service to the Rajah of *Satara* with ten horsemen."

This is given on the authority of Lieutenant-Colonel *Briggs*, formerly resident at *Satara*. The date does not appear.

The property thus granted was situated in the districts of *Satara*, *Poona*, and *Khandesh*.

The earliest document relating to the property is of the date of 1709 A.D. This document is headed, "Body of horse under the control of the State," and it runs thus: "Body (of horse under) Shekh *Mira*; saranjam, total as in last year (as per) mandatory letters"; and it includes nine mokasa villages and the inam village of *Pasarni*.

The next document is dated 1715 A.D., and is also headed "Body of horse under the control of the State, Body (of horse) Shekh *Mira*," and is as follows: "The letter of command dated 18th moon Saval (regarding) the village of *Pasarni*, *Samat Haveli*, *Prant Wai*. A deed of inam was formerly given about the grant of this village as inam to the aforenamed person, together with all rights and cesses, the present and future taxes, and together with sardeshmukhi. The deed having been burnt, new deeds have been prepared and given."

J. C. 1892

SHEKH SULTAN SANI v. SHEKH AJMODIN.

In 1718 A.D. a document headed, "Saranjam for the body of horse under the control of the State . . . in the charge of Shekh *Mira*," includes and comprises "village of *Pasarni*, inam village," also "inam lands in *Kasba Wai* (called) *Katban*, the place of residence of the afore-named person, are granted in inam."

Katban appears to have been granted to Shekh *Mira* (date uncertain, qu. 1715), "to him and his son, grandson, &c., from generation to generation."

The grant of *Pasarni* was confirmed in 1752 by the mother of the then Rajah of *Satara* to Shekh *Khan Mahomed* I., the son of Shekh *Mira*, in the same terms.

In a document described as the Peshwa's diary of 1763 A.D., it is recorded that "mokasa villages, &c., have been continued by the Government from former times to Shekh *Khan Mahomed* in the service of Government. They are in the same manner confirmed."

Amongst the properties enumerated are "the whole village of *Pasarni, Samat Haveli, Prant Wai*, together with the deshmukhi and sardeshmukhi (rights) being inam."

In 1785 A.D., in the diary of the Peshwa, is registered: "the sanad for continuing the saranjam to Shekh *Mira Waikar*," *i.e.*, *Mira* II., and the saranjam is thus described:—A saranjam (consisting) of amal (shares of revenue), of mahals, and of single villages, as also inam villages and lands, were continued from former times to Shekh *Khan Mahomed Walad* Shekh *Mira*, for the support of troops. He having died, the saranjam and inam villages and lands have as before been confirmed upon his son Shekh *Mira*, for the support of troops." Then follows an enumeration of the properties, which includes the mokasa lands and inam villages and lands, amongst these latter being the whole village of *Pasarni, Samat Haveli, Prant Wai.*

It is to be observed that this document clearly includes the inam villages and lands with the mokasa as parts of one saranjam for the support of troops.

When the power of the Peshwa was overthrown, Shekh *Mira* II. was in possession of this saranjam. A portion of the conquered territory was placed under the Government of the Rajah of *Satara*, with whom a treaty was entered into on the 25th of

September, 1819, by which it was provided that the possessions of jaghirdars within the Rajah's territory were to be under the guarantee of the British Government, which engaged to secure the performance of the service due to the Rajah according to established custom.

Separate agreements were entered into with several jaghirdars, of whom Shekh *Mira* II. was one. The agreement with Shekh *Mira* II., which was made on the 3rd of July, 1820, thus commences:—"These jaghires, &c., were formerly held by you as a personal and military jaghire; but having come into the possession of the British Government along with the rest of the country, they are now restored, in consideration of the antiquity and respectability of the family, to be held as formerly in personal and military jaghires."

The 7th Article stipulates that "without orders from Government no extra troops are to be levied, and none assembled for the purpose of making war on any one. In matters of family disputes concerning relationship and such like, no appeal to arms can be permitted, but the case is to be represented to the Agent of the British Government, who will communicate with the Government of His Highness, and whatever decision is given must be reckoned binding."

This agreement does not specify the jaghires to which it relates. The 5th Article is as follows:—"Whatever inam villages, wuttuns, and other allowances have hitherto belonged to Shekh *Mira Waekur* within the territories of the British Government or of His Highness, shall be continued, and whatever items of revenue belonging to His Highness's Government may be within the jaghire, shall be continued to be paid."

There are no words in this agreement having reference to the descendants of Shekh *Mira*, and it distinctly states that the jaghirs are to be held "as formerly in personal and military jaghires." This agreement must be regarded as the root of the title (whatever it may be), which was acquired by Shekh *Mira* II.

With regard to the expression contained in some of the sunnuds previously cited of the grant being to the person named, "his son, grandson, &c., from generation to generation,"

J. C. 1892 SHEKH SULTAN SANI v. SHEKH AJMODIN.

it has been observed by many writers of authority on this subject, that they do not, as might be supposed, impart a fixed hereditary tenure. Colonel *Etheridge*, in his preface to the narrative of the *Bombay Inam Commission*, quotes the language of Sir *Thomas Munro*, in a minute of the 15th of March, 1822, in which he states that the "terms in such documents (sunnuds) for ever, from generation to generation, or in Hindu grants, while the sun and moon endure, are mere forms of expression, and were never supposed, either by the donor or receiver, to convey the durability which they imply, or any beyond the will of the sovereign;" and in a subsequent minute of the 16th of January, 1823, Sir *Thomas Munro* shews that while the seizure of private property by the native princes would have been considered unjust by the country, jaghir grants were not regarded by the people in the light of private property (*Etheridge*, p. 14).

Their Lordships entertain no doubt that the engagements entered into by the English Government with the Rajah of *Satara* and with the several jaghirdars, did not impart any greater fixity of tenure than had been previously enjoyed by those jaghirdars under the native rulers, and that their jaghirs were liable to resumption at the will of the Government, although from reasons of political expediency the English authorities would not be disposed to add to the disturbance and confusion attending a conquest, by dispossessing the holders of property to any greater extent than was necessary for safety.

Thus, on the death of Shekh *Mira* II., in 1827, the saranjam which he had enjoyed was continued to his son Shekh *Khan Mahomed* II., but the character of his tenure was distinctly stated in the document by which possession was given to him: "Your father Shekh *Mira Waikar* died this year, and the saranjam in his possession was thereupon placed under attachment by Government. A petition having now been submitted by you, it has been decided to continue the saranjam to you as before, for service to be rendered by you. The attachment has therefore been removed, and . . . . this sanad has been issued to you. The amount which is always paid from the Government Treasury on account of the mokasa, which forms part of the saranjam, shall therefore continue to be paid to you. As regards the

alienated lands, you should take them back in your possession and enjoy them in accordance with past usage, and in accordance with the agreement passed by you to Government you must continue to honestly and faithfully perform the service."

This last clause apparently relates to lands which had been alienated by Shekh *Mira* II., but which, as the Government pointed out, he had no right to do.

These were the terms on which Shekh *Khan Mahomed* II. acquired the position of jaghirdar under the Rajah of *Satara*. He accepted that position as the gift of the British Government, which had decided to continue the saranjam to him. In this document there is no reference to the descendants of *Khan Mahomed*, and the grant is made for service to be rendered by him, and is in its terms personal. One of the questions to be determined in this case is whether, on the death of *Khan Mahomed*, the Government had or had not the same power of deciding to whom it would grant this saranjam, which it had exercised on the death of the previous holder in favour of *Khan Mahomed*. In making that grant, the Government was, no doubt, influenced by the fact that *Khan Mahomed* was the son of the previous jaghirdar, and that it was politically expedient to continue the possession of the saranjam in the same family, but there is nothing to shew that the Government recognised any right of succession in the son; the language of the grants in the cases both of Shekh *Mira* II. and Shekh *Khan Mahomed* II., points in the opposite direction. The practice of re-granting jaghirs to the sons of preceding jaghirdars naturally had the effect of leading sons to expect to succeed their fathers, and when this practice was long continued in one family, the original character of the holding became obscured. This process has been commented on by many writers on the subject of *India*. In the Hon. *Mountstuart Elphinstone's* History of *India*, it is said (5th edition, p. 82): "Notwithstanding all these precautions, the usual consequences of such grants (jaghire) did not fail to appear. The lands had from the first a tendency to become hereditary, and the control of the Government always grew weaker in proportion to the time that had elapsed from the first assignment. The original principle of the grant, however, was

J. C. 1892 SHEKH SULTAN SANI v. SHEKH AJMODIN.

never lost sight of, and the necessity of observing its conditions was never denied." In the present instance, there was but the one re-grant to *Khan Mahomed* since the original grant to Shekh *Mira*, and in that re-grant the character of the holding as saranjam (or jaghir) derived from the decision of the Government in the applicant's favour was expressly stated.

In 1834 an inquiry arose as to the tenure of certain jaghirs in *Khandesh*, and as to that of Shekh *Mira*. Mr. *Warden*, the Deputy Agent, writing to Mr. *Saville Marriott* on the 3rd of January, 1834, says: "*Shaik Meera Waeekar* was a *Satara* feudatory chief, serving the Raja with a few horse, and holding a saranjam for his life in *Khandesh*. I have referred to his sunnud or title deed, and find that his estate was clearly a life grant, the customary provision for the continuance of it by inheritance to be found in the sunnuds of all hereditary saranjamdars being omitted, and the usual form of life grants adopted."

What document Mr. *Warden* refers to does not appear; possibly it was the sanad of 1785.

In the course of the inquiry arising out of Mr. *Warden's* report, Mr. *Elphinstone*, who had been engaged in the settlement of the *Deccan* in 1818–19, was referred to by the Court of Directors for his advice, and he, in the year 1838, recommended that all jaghirs "granted by the Mogul Emperor or the Rajahs of *Satara* should be hereditary in the fullest sense of the word;" and with regard to Shekh *Mira*, he stated that his impression was that Shekh *Mira's* ancestor commanded a Mogul fort at the time of the first conquest by the Mahrathas, and surrendered on terms, one of which was the receipt of an hereditary jaghir. If this be so we can have no right to resume his lands unless we can annul the agreements of former Governments"; and he added that a reference to his secretary's list of jaghirdars, prepared in 1818–19, would settle the question.

Upon reference to this list (transmitted the 25th of October, 1819, which is headed, "Mr. *Elphinstone's* list of saranjams") Shekh *Mira's* name appears. He is there stated to belong to the class of sirdars, or great chiefs. It is stated that he made his submission on the 28th of March, having left the Peshwa at least

a month before; that he is an old jaghirdar of the Shahoo Rajah, and under the heading "Decision" is written, "To have all his jaghirs except those in the Nizam's country on account of his early submission and ancient family." And under the heading, "For what period recommended," is written, "Hereditary."

It has been seen, however, that this recommendation was not acted upon at the time, and that the grant which was in fact made to Shekh *Mira* did not contain any language importing that the grant was of an hereditary jaghir.

In consequence of the advice of Mr. *Elphinstone*, the Court of Directors, in a Despatch of the 26th of October, 1842, directed that all jaghirs in "Class I. of Mr. *Mill's* list, which bears date anterior to 1751, be as Mr. *Elphinstone* recommends, hereditary in the fullest sense of the word, together with those of which the dates are unknown, but which are known to be ancient. The latter class, though small, includes the three resumed jaghirs of Shekh *Meera*, *Sumsher Bahadur*, and *Eshwant*, *Rao Dabhary*. The first of these, already restored to the son of the last holder, but for life only, must be considered hereditary."

It is to be observed with regard to this direction that it recognises that the jaghirs of Shekh *Mira* have been restored to the son of the last holder (that is, to Shekh *Khan Mahomed* II., son of Shekh *Mira* II.), but for life only, and that the time for taking any action with reference to the succession would not arise in the ordinary course of things until the death of *Khan Mahomed*. No fresh grant was made to *Khan Mahomed*, and his rights must depend upon that grant, which had in fact been made to him on the death of his father. It remained for the Government, when the necessity should arise, to determine to whom it should re-grant, or in whom it should recognise a right of succession to the jaghirs then possessed by *Khan Mahomed*.

This was the state of things down to 1857, when one *Shaikh Sultan Inamdar* presented a petition to the Assistant Inam Commissioner at *Satara* complaining that, although he and others shared in the inams held by the family of *Khan Mahomed*, their names were purposely omitted by him (*Khan Mahomed*) in a genealogical table, which he produced before the Mamletdar of

J. C. 1892

SHEKH SULTAN SANI v. SHEKH AJMODIN.

Wai in a certain inquiry affecting those shares, while a son of one *Manik Dewtia* was mentioned in it as his (*Khan Mahomed's*) son.

This petition was forwarded to the Magistrate of *Satara*, who directed an inquiry into the charge thus made against *Khan Mahomed* of putting forward the child of another man as his own.

This inquiry was conducted by the first Assistant Magistrate, Lieutenant *Sandford* (afterwards Sir *Herbert Sandford*), whom the Governor in Council describes as a magistrate of great experience and intimate knowledge of the people and politics of *Satara*. With him was associated in the inquiry *Gopalrao Hurry*, of whom the Governor says that he was an officer held in high estimation, who was afterwards raised to several important judicial posts.

This inquiry appears to have been a preliminary investigation with a view to considering the expediency of instituting criminal proceedings against *Khan Mahomed*, and those supposed to have assisted him in putting forward a supposititious child as his own.

The inquiry was conducted in a judicial manner, the witnesses were examined on oath, and *Khan Mahomed* was offered the opportunity of cross-examining the witnesses who deposed against him, and he produced many witnesses in his defence.

In the result Lieutenant *Sandford* and *Gopalrao Hurry* concurred in reporting that the charge had been established, and that the child put forward by *Khan Mahomed* as his son, namely, the present Plaintiff, was not his child, but the child of *Manik*.

The report of Lieutenant *Sandford* and the evidence taken by him were transmitted by the Magistrate of *Satara* to Mr. *Ellis*, described as the Acting Revenue Commissioner for Alienations, and were by him forwarded to the Government at *Bombay*.

Mr. *Ellis* concurred in the view of Lieutenant *Sandford*, and he deprecated putting *Khan Mahomed* and the others concerned on their trial, and for reasons which he gave, he did not recommend the confiscation of his saranjam, but suggested that the name of *Khan Mahomed* be struck off the list of sirdars, and that he be deprived of all the honorary privileges enjoyed by persons of his rank, the only exception in his favour being the

retention of the arrangement then in force, whereby a portion of his saranjam was assigned to his creditors, and the balance allowed to him for subsistence.

In a subsequent letter of Mr. *Ellis* to the Secretary to Government, dated the 16th of April, 1858, he suggested that the Government should declare that even if *Khan Mahomed* "should leave a legitimate son, the saranjam will not be continued to him."

This recommendation was ultimately, on the 5th of April, 1860, adopted by the Government, and communicated in a letter of that date to the Revenue Commissioner for Alienations, Captain *T. A. Cowper*.

This resolution was communicated to *Khan Mahomed*, who thereupon, on the 22nd of October, 1860, petitioned the Governor in Council to review the proceeding.

The petition was referred to Mr. *Inverarity*, the Collector at *Satara*, who on the 21st of March, 1861, reported that he was not of opinion that *Khan Mahomed* had succeeded in shaking the validity of the evidence which had been brought forward, and that he did not recommend that a fresh inquiry be granted.

And on the 8th of April, 1861, Mr. *Forbes*, the Acting Secretary to the Government, informed Mr. *Inverarity* that, on a review of all the circumstances of this case, His Excellency the Governor in Council was of opinion that no reasons had been advanced by *Khan Mahomed* which would justify the grant of a fresh inquiry, and that the decision which he appealed against must, therefore, be regarded as final.

Communication to this effect was directed to be made to *Khan Mahomed*.

In 1863, *Khan Mahomed* again appealed to the Governor in Council, and his memorial was referred to the Duke of *Argyll*, Secretary of State for *India* in Council, who, on the 26th of October, 1871, declined to reopen the case.

Khan Mahomed died on the 31st of December, 1872. It then became necessary to determine to whom his saranjam should be granted. Amongst the candidates was Shekh *Ajmodin*, the present Respondent, a descendant of Shekh *Abdul Khan*, the half-brother of Shekh *Mahomed* II.

J C. 1892

SHEKH SULTAN SANI v SHEKH AJMODIN.

This led to a resolution of the Government, dated the 23rd of October, 1873, "That the Agent for Sirdars should be requested to investigate judicially, and after due notice to all parties concerned, whether Shekh *Ajmodin* is under Mahommedan law the legitimate successor to the headship of the family, either by adoption or descent."

Baron *Larpent*, the Agent for *Satara*, in pursuance of the resolution of the 23rd of October, 1873, proceeded to investigate judicially the questions referred to him after due notice to all parties concerned. Amongst the parties who appeared before him were Sultan *Khan Sani*, claiming to be the son of *Khan Mahomed*.

On the 28th of November, 1873, Baron *Larpent* made his report. The important passages are as follows: "The fourth issue remains for decision, viz., Is *Ajmodin*, under Mahomedan law, the legitimate successor to the headship of the family of Shaik *Khan Mahomed*? I think that there can be no doubt he is not. As I have already said, Shekh *Khan Mahomed* left a daughter, and she has sons, and these sons are nearer the head of the family than the son of a daughter of Shekh *Abdul Kadar*. The decision as to who should be recognised by Government as head of this family does not, in my opinion, rest on a consideration of who may be the next of kin to Shekh *Khan Mahomed* under Mahomedan law. Government appears to me to have decided in their letter, No. 1497 of the 5th of April, 1860, that Shekh *Khan Mahomed's* branch should forfeit all right to succeed to the estate. Paragraph 6 is as follows: 'Shaik *Khan Mahomed* will not probably have another son of his own loins, but the Right Honourable the Governor in Council concurs with Mr. *Ellis* in considering that the Waikar should be told that even if he have a son, that son will not be allowed to succeed. . . . . The forfeiture was imposed on account of the fraud practised by Shekh *Khan Mahomed*. His name also was struck off the list of sirdars, and although subsequently the name was re-entered, for certain reasons the order of forfeiture was not rescinded. It appears to me, therefore, that any property, the succession to which Government has the power to regulate, should go to Shekh *Abdul Kadar's* heir, *Ajmodin*, both

on the grounds of the former decision, and because of the great wrongs which *Khan Mahomed* inflicted on his brother.'"

On the 27th of March, 1874, the Government confirmed Baron *Larpent's* report in the following terms:—

"Resolution,—The proceedings of the Agent for Sirdars are approved, and for the reasons given by Baron *Larpent*, Shekh *Ajmodin* should be recognised as the head of the family, to whom the saranjam should be continued. To avoid disputes the allowances for maintenance of the widows of the deceased Shekh *Khan Mahomed* and Shekh *Abdul Kadar*, and of any others who have a claim for maintenance on the estate, should be settled by order of Government after receiving the recommendation of the Agent.

"The allowances now paid to Shekh *Rakmodeen* and to *Rahimanbee*, under Government letter, No. 1293, of the 28th of March, 1861, should be continued."

And on the 18th of June, 1874, Lord *Salisbury*, as Secretary of State in Council, expressed the Government's approval of the above resolution in these terms:—

"In reply to the letter of your Excellency's Government in this department, No. 17, of the 4th of May, 1874, in which you report the death of *Khan Mahomed Waikar*, and the nomination by you of his kinsman *Ajmodin*, a lineal descendant of the first British grantee, as the head of the family, to whom the saranjam should be continued, I have to inform you that I see no objection to this arrangement. Shekh *Khan Mahomed's* fraud in endeavouring to obtain the succession of a supposititious child having been punished by the exclusion of his own progeny from the succession, Her Majesty's Government can only express their hope that the branch of the family now installed may prove itself worthy of your selection."

In pursuance of these resolutions the whole of the jaghir and inam incomes were made over to Shekh *Ajmodin*, and the Agent, and the administrators of the estate which had been taken into the hands of the Government, called on all persons to acknowledge him as owner. On the 6th of October, 1876, Colonel *Etheridge*, the Alienation Settlement Officer, reported as follows:—

"He (Colonel *Etheridge*) is of opinion that as Government

J. C. 1892 SHEKH SULTAN SANI v. SHEKH AJMODIN.

have sanctioned the adoption, the whole estate intact, saranjam and inam, as restored after the war, under the treaty of the 3rd of July, 1820, is continuable as a guaranteed estate to the adopted son (*Ajmodin*) as the head of the family, and should be entered in the accounts accordingly, the same as all other treaty estate of saranjam and inam."

On the 6th of November, 1876, Colonel *Etheridge's* Report was confirmed by the Government in the following Resolution:—

"The suggestions of the Alienation Settlement Officer are approved, and should be carried out."

Thus it appears that the Government, on the death of *Khan Mahomed*, resumed the saranjam held by him, and re-granted it to *Ajmodin*, on the ground that the Government has the right to resume jaghirs. It is not to be supposed that this right would be exercised capriciously, but, assuming it to exist, it would not be competent for any Court to review this decision of the Government on the ground that the reasons upon which it proceeded were erroneous. This Board, therefore, does not feel called upon to express any opinion upon the question whether the spurious birth of Sultan *Sani* has been established. Their Lordships, however, see no reason to doubt that the inquiry by Lieutenant *Sandford* was conducted in a judicial manner, and that full opportunity was given to the accused to cross-examine the witnesses called against him, and to call witnesses in his favour. The good faith of Lieutenant *Sandford* and his coadjutor, *Gopalrao Hurry*, has not been called in question, and the various persons whose duty it has been to consider the findings of those officials have arrived at the conclusion that there was no ground to set aside those findings. Their Lordships are of opinion that the question to whom a saranjam or jaghir shall be granted upon the death of its holder is one which belongs exclusively to the Government, to be determined upon political considerations, and that it is not within the competency of any legal tribunal to review the decision which the Government may pronounce. This principle is clearly expressed, not for the first time, in *Bombay Act* VII. of 1863, sect. 2, clause 3, and is recognised in cases where the question has been raised.

Thus far as to the saranjams claimed by the Appellant. It has been contended that a different question arises with regard to the inams. Their Lordships, however, are of opinion that no distinction can be drawn between the inam and the other property in question. As has been pointed out, the sunnud of 1785 included the inam villages and lands with the mokasa as parts of one saranjam for the support of troops. The effect of the treaty of the 3rd of July, 1820, was to continue to Shekh *Mira* the whole of the property, including the inam, as a personal and military jaghir. This was done by the Government on political considerations, and the tenure thereby created was political. This was the view taken by the Government in 1876, when it adopted the report of the Alienation Settlement Officer, that "the whole estate intact, saranjam and inam, as restored after the war under the treaty of the 3rd of July, 1820, is continuable as a guaranteed estate to the adopted son" (*Ajmodin*) "as the head of the family."

Their Lordships, therefore, concur in the opinion expressed by the Governor in Council that a mixed estate of saranjam and inam was granted by the treaty of July, 1820, to be held on the same political tenure, and passed intact to the person whom the Government might recognise as the head of the family, and that it is not competent for any court of law to dispute it.

In this view of the case it is unnecessary to consider the various other questions which have been discussed on the argument of this appeal.

Their Lordships will humbly report to Her Majesty that the decision of the Governor in Council be affirmed. The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Blount, Lynch, & Petre.*
Solicitors for Respondent: *Burton, Yeates, Hart, & Burton.*

J. C.* 1893 Jan. 25; Feb. 11.

MAHOMED ABDOOL HAI . . . . . APPELLANT;

AND

GUJRAJ SAHAI AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Public Demands Recovery Act (VII. of 1880, Beng. C.)—Certificate and Notice—Irregularity of Procedure—Sale set aside.

In a suit by the Respondent to cancel a certificate issued under Act VII. of 1880 (Beng. C.), and an auction sale of his villages in execution of that certificate, and for confirmation of proprietary right, it appeared that the certificate, though in statutory form, was in a tattered condition, wanting the Collector's signature, and erroneously set forth as debtors two out of three former proprietors; that the notice thereunder, if served, was addressed in the same way; that the execution sale purported to pass to the Appellant the interest of the three former proprietors; that no certificate of purchase was produced or evidence given of price paid:—

Held, that such proceedings could not affect the Respondent's proprietary right, and that his suit must be decreed.

The procedure to be observed by the road cess authorities explained.

APPEAL from a decree of the High Court (Aug. 2, 1889) reversing a decree of the District Judge of *Tirhoot* (May 10, 1888).

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellant, contended, with regard to the certificate, that the District Judge was right in presuming under the circumstances that it had been duly signed by the Collector. It was indorsed by the Deputy Collector five days after it was filed, with directions that it should be acted on, and presumably the signature of the Collector was affixed to it at that time. Reference was made to Act VII. of 1880 (Beng. C.), called the *Public Demands Recovery Act*, s. 21. It was admitted that cesses were due from the Respondent *Gujraj* for 1885, and that an agent had been deputed to realize them, and it was contended that the finding of the District Judge as to the non-payment of those

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

arrears was correct, and that the High Court had not sufficient grounds for reversing it. Reference was made to sects. 8 and 22 of the Act, and it was contended that payment of the amount stated in the certificate of the Collector can only be duly made in the manner provided for the deposit of decretal amounts in execution of decrees—that is, in this matter, by notice to the Collector. Besides, even if the judgment of the High Court was right, it should have been made on terms of the Appellant as auction purchaser being repaid his purchase-money with interest. Reference was made to *Sadhusaran Singh* v. *Panchdeo Lal* (1); *Rash Behari Mukerji* v. *Pitambori Chowdhrani* (2).

Cowie, Q.C., and *Branson*, for the Respondent *Gujraj Sahai*, were not heard.

The judgment of their Lordships was delivered by

LORD WATSON:—

This suit, which relates to three villages, *Ghouspore*, *Kadirpore*, and *Suratpore*, situate in the district of *Mozufferpore*, in *Tirhoot*, was brought by *Gujraj Sahai*, one of the Respondents, in the Court of the District Judge, against the Secretary of State for *India*, and other Defendants, including the present Appellant, *Abdool Hai*. The plaint prays for confirmation of his right and possession, and for cancelment of a certificate dated the 13th of January, 1886, issued under the Act No. VII. of 1880, and of an auction sale in execution of that certificate upon the 15th of April, 1886. The Appellant defends, on the ground that he acquired a valid right to the lands as purchaser at the sale sought to be cancelled. The Secretary of State applied for an extension of the time for lodging his written statement, but made no further appearance in the action, although his name appears as that of a Respondent in this appeal.

Gujraj Sahai, who may be properly described as the Respondent, in May, 1882, purchased the three villages in question from the Land Mortgage Bank of *India*, and in October, 1884, he was entered as proprietor in the land register kept for the *Mozufferpore* district. The previous proprietors were *Bibi Amina*,

(1) Ind. L. R. 14 Calc. 1. (2) Ind. L. R. 15 Calc. 237.

J. C 1893

MAHOMED ABDOOL HAI v GUJRAJ SAHAI

Bibi Nisar Fatima, and *Bibi Manzurul Fatima*. Notwithstanding the purchase, and subsequent mutation of names in the land register, these ladies continued to be treated by the Collectorate as the proprietors liable for road cess; and the form of the proceedings taken by the Collector under Act No. VII. of 1880, which are the subject of controversy in this case, is obviously due to that circumstance. Demands of road cess made against *Bibi Amina* were duly met by the Respondent from the time of his purchase till the end of 1884; but none of the three instalments of cess falling due in the year 1885 were paid. Accordingly, *Jogeswar Sahai*, a tehsildar, to whom the collection of these instalments had been entrusted, reported to the Collector that the arrears of road cess in respect of the three villages amounted, with interest and commission, to Rs.43 4*a* 6*p*. The only names mentioned in the report are those of *Bibi Amina* and *Bibi Nisar Fatima* as the holders of the estate for which the arrears were due.

Thus far there is really no dispute as to the facts of the case. After he received the tehsildar's report, it appears that the Collector did take certain proceedings for recovery of the arrear, which were meant to be in pursuance of Act No. VII. of 1880, and which terminated with the exposure of the three villages to auction sale on the 15th of April, 1886. With regard to the actual tenor as well as the legal effect of these proceedings, the parties are widely at variance. In substance, the Repondent's case is that these proceedings were in themselves informal and ineffective to displace his title as owner; and that, assuming them to be formal, the sale was illegal by reason of his having previously paid the arrear due to the Collector.

The Appellant disputes the fact of payment, and maintains that the whole procedure was in conformity with the provisions of the Act of 1880, and that the property of the three villages has been duly vested in him as auction purchaser at the sale of the 15th of April, 1886.

Two of the issues adjusted for the trial of the case sufficiently raise all the questions which were argued in this appeal; these being:—

4th. Before the 15th of April, 1886, did plaintiff pay the

amount due by him to any person authorized to receive the same?

6th. Was the certificate of the 13th of January, 1886, informal? If so, what is the effect?

The District Judge answered both these issues in the negative, and dismissed the suit. On appeal his decision was reversed by a Divisional Bench of the High Court at *Calcutta*, and the suit decreed with costs to the present Respondent, both against the Secretary of State and against the Appellant.

It will be convenient to begin with the sixth issue, and, first of all, to consider the evidence on record of the precise terms of the proceedings which were taken by the Collector for recovery of these arrears of cess, under the Act of 1880. The initial step prescribed by the Act is the making of a certificate by the Collector, in statutory form, setting forth the amount and particulars of the arrears demanded, and the name and address of the debtor by whom they are owing. The Act requires that the certificate shall be signed by the Collector. When completed and duly filed, the certificate has, in so far as regards the remedies for enforcing it, the force and effect of a decree of a Civil Court, the Secretary of State being the judgment creditor, and the person therein described as debtor being the judgment debtor. There has been produced from the Collector's office a document bearing date the 13th of January, 1886, which is in the form of a statutory certificate of demand. When produced, it was in a tattered condition, and that part of the paper upon which the Collector's signature should have been written was wanting. It will be necessary to consider hereafter whether it ought to be presumed that, as originally prepared, the document was completed by his signature, that being one of the points upon which the Courts below have differed in opinion. The amount of arrears, and the property in respect of which they had accrued, are stated in terms similar to those of the tehsildar's report of the same date. The names of the defaulters are given as "*Bibi Amina*, and *Bibi Nisar Fatima*, and *Manzurul Fatima*, regarding the property purchased by *Babu Gujraj Sahai*."

When the certificate has been filed, the Act prescribes that the Collector shall serve a copy thereof, together with a notice in

J. C. 1893 MAHOMED ABDOOL HAI v. GUJRAJ SAHAI.

statutory form, upon the judgment debtor. The notice contains an intimation that, if the debtor fails to shew cause within thirty days, or does not shew sufficient cause why the certificate should not be executed, it will be executed in the same manner as if it were a decree of a Civil Court, unless the amount certified as being in arrear is paid into the Collector's office. Upon due service of the copy-certificate and notice, the certificate binds all immoveable property of the judgment debtor within the jurisdiction of the Collector, to the same effect as if it had been attached under sect. 274 of the Civil Procedure Code. There is produced from the office of the Collector a notice dated the 21st of January, 1886, which bears that a copy of the certificate was annexed. There is a dispute as to its service; but, assuming the document to have been duly served upon the Respondent, it is open to the same observations as the certificate. It is addressed, not to the Respondent *Gujraj*, but to the ladies who had been previous owners of the property.

No one having appeared to shew cause why the certificate should not be executed against the judgment debtors, a sale followed, on the 15th of April, 1886, at which the Appellant appears to have made the highest bid of Rs. 560. That is evidenced by a memorandum of bids, produced from the office of the Collector, which is signed by the Appellant as highest bidder and purchaser at the sale. The subjects exposed for sale on that occasion are described in the memorandum as "the right and interest owned by *Mussammat Bibi Amina*, *Bibi Nisar Fatima*, and *Bibi Manzurul Fatima*, in the property purchased by *Babu Gujraj Sahai*, in Mouzah *Ghouspore*, &c." Any certificate of sale issued to the purchaser would presumably, and certainly ought to have run in the same terms. But the Appellant has not produced a certificate, and he has neither alleged nor attempted to prove that he paid the price; yet he had the courage to argue that, in the event of his failing in this appeal, he ought to have a decree against the Respondent for repayment of the Rs.560.

Assuming that the certificate of the 13th of January, 1880, and the steps of procedure which followed upon it, were authenticated in terms of the Act, and were duly intimated to the Respondent, their Lordships are of opinion that they could not

in any way affect his right of property in the three villages for which arrears of cess were due. If they were directed against the Respondent, and were meant to attach his interest, these proceedings were unwarranted by the provisions of Act VII. of 1880, which only authorize the attachment and sale of property of the persons who, on the face of them, are described as the judgment debtors. The Act gives no authority to attach and sell the estate of any other person, in satisfaction of the arrears due by the judgment debtors. The certificate upon which the Appellant relies could not have the force and effect of a decree of a Civil Court for the purpose of execution, except against *Bibi Amina*, *Bibi Nisar Fatima*, and *Bibi Manzurul Fatima*. If, on the other hand, the property sold in execution of the certificate was merely the interest of the three ladies, as the memorandum of bids very strongly suggests, the Respondent's title and proprietary possession remain unimpaired.

These considerations are in themselves sufficient to dispose of the present appeal. But their Lordships desire to express their concurrence with the view taken by the learned Judges of the High Court, that there is no evidence to shew that the certificate of the 13th of January, 1886, was ever signed by the Collector in compliance with the requirements of the Act. Direct evidence there is none; but the District Judge found, as matter of fact, that it had been signed, applying the maxim *Omnia rite et solenniter acta*. According to the learned Judge's own shewing, the circumstances of the case are not very favourable to the presumption. Of one writing produced, he says: "Like everything else which has come under my cognizance from a road-cess office, it is a most slovenly document." The certificate in question he does not seem to have regarded as an exception from the general rule. He describes it as drawn up "in the usual slovenly manner"; and he ascribes the error of inserting the ladies' names as debtors, after mutation in the land register, to "oversight and general slovenliness." When the extant parts of an incomplete writing exhibit such traces of careless preparation, their Lordships think it would be straining the maxim too far to presume that the parts which have disappeared must necessarily have been free from error.

J. C. 1893

MAHOMED ABDOOL HAI v. GUJRAJ SAHAI.

Their Lordships are also of opinion, with the learned Judges of the High Court, that the Respondent has proved payment of the arrear of cess specified in the certificate before the date of the sale proceedings; and that the fourth issue ought therefore to be answered in the affirmative. The receipt is proved to have been delivered to the Respondent's mokhtar, in exchange for the money, by *Laldhari Singh*, who at that time was admittedly one of the tehsildars employed in the collection of cess. The District Judge negatived the payment because of the impossibility of separate receipts for the same cess having been issued to two different tehsildars, as deponed to by the Deputy Collector. Now the evidence of the Deputy Collector hardly goes that length. He only says that "it is never the custom to write the same demand in more than one cheque book," which is very different from saying that such a thing could not occur. Had the evidence of payment rested simply upon the receipt, there might have been some room for doubt. But the important evidence comes from the office of the Collector. The money was paid into the treasury by *Laldhari Singh*, accompanied by a chalan under his hand, dated the 1st of February, 1886, which states the payment to be on account of cess of Mouzah *Ghouspore*, &c., remitted by *Bibi Amina*, one of the judgment debtors. The payment thus made was entered in the register of receipts of the treasurer of *Mozufferpore* treasury for the month of February, 1886, reference being made to the chalan for particulars. Whether *Laldhari Singh* had or had not proper authority to collect the arrear is really a matter of no consequence, because it is clear that, more than six weeks before the auction sale, the money was paid into the Government treasury, along with a distinct statement that it applied to the arrears of cess for the three villages now in dispute.

Upon the arrear being paid into the treasury, it became the statutory duty of the Collector, under sect. 22 (*b*) of the Act, to enter satisfaction upon the certificate of the 13th of January, 1886, under his hand and signature, which he failed to do. The appellant argued that, there being no such entry upon the certificate on the 15th of April, his purchase of that date was valid. It would be a singular result if a Collector's neglect of his

statutory duty gave him statutory power to sell in execution the property of a person who owed nothing to the Government. That such was not the intention of the Legislature is abundantly clear. By the terms of the notice served upon the judgment debtor along with a copy of the certificate, all that the debtor is required to do, in order to prevent execution of the certificate, is to pay the amount of arrears demanded into the office of the Collector.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The Appellant *Abdool Hai* must pay to the Respondent *Gujraj Sahai* his costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitor for Respondent: *J. F. Watkins.*

NARINDAR BAHADUR SINGH AND ANOTHER PLAINTIFFS;

AND

ACHAL RAM . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869, *Class* 2—*Taluks descendible to a Single Heir—Principle on which Single Heir is ascertained.*

Where an estate is placed in class 2 and not in class 3 of Act I. of 1869 it descends to a single heir, not necessarily by the rule of lineal primogeniture. Degree prevails over line in the ascertainment of such heir, but where the degree is equal line prevails.

Sect. 22, sub-sect. 11, in referring the parties to the law which would govern the descent of property when the special provisions of the Act are exhausted, includes family custom in such law.

APPEAL from a decree of the Judicial Commissioner (April 24, 1888), affirming a decree of the District Judge of *Fyzabad* (June 26, 1886), and dismissing the Appellants' suit with costs.

The decree of the First Court was based upon limitation, the

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

J C. 1893 NARINDAR BAHADUR SINGH v ACHAL RAM

suit having been brought in January, 1886, on the ground that the succession opened to collaterals on the death of *Sarfraz Kuar*, the widow of the last full owner, in 1870, in which year the title of the first Appellant's predecessor was alleged to have accrued. The High Court dismissed the suit on the merits, holding that on the death of the widow her daughter, *Birj Raj Kuar*, succeeded, and that on her death the Appellant was not entitled as the next reversionary heir, *Jubraj* being on his own evidence nearer in the order of succession. The Appellant's predecessor *Harbaqhat* would have been entitled, but he had predeceased *Birj Raj Kuar*, and as between the Appellant and *Jubraj* the latter was equal in degree but prior in line.

Sir *Horace Davey*, Q.C., and *C. W. Arathoon*, for the Appellants.

Cowie, Q.C., and *Cowell*, for the Respondent, were not heard.

1893 Feb 3

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The question in this case has come to a very simple point indeed after all this litigation. The estate is in *Oudh*, and was granted by the Crown to one *Pirthi Pal* after the confiscation, and it is placed in class 2 of Act I. of 1869, and not in class 3. The effect of that is that the estate is labelled as one which, according to the custom of the family, descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act; though if two collaterals, or persons in the line of heirship, are equal in degree, then, as the property can only go to one, recourse must be had to the seniority of line to find out which that one is.

Pirthi Pal died in the year 1859. He left a widow and a daughter, but no son. There was no question as to the right of his widow to succeed; the Act of 1869 provides for that. She

succeeded, and held during her life, and died in the year 1870, and the first question is whether on the death of the widow the daughter succeeded. If she did not, the succession opened to collaterals of *Pirthi Pal* at the death of his widow; and there is no doubt therefore upon the pedigree that one *Harbaghat* would then be the nearest collateral to take, and the Plaintiff *Bhai Narindar* is his heir. Therefore it is the Plaintiff's interest to shew that the succession to collaterals did open at the death of the widow in 1870; and for that purpose he attempts to prove a family custom to the effect that females shall not succeed. The only proof of such a custom is the production of certain Wajibularzes. But it is not shewn that the villages of which they were recorded are villages now in suit, and it is not shewn that they belong to the same family as the family which is now disputing the question of succession. There is therefore no proof of the custom before their Lordships. Besides this there are concurrent findings in the Courts below in favour of the succession of *Pirthi Pal's* daughter which, though they do not in terms negative the custom alleged, are absolutely inconsistent with it, and must be taken as concurrent findings against the custom. Therefore the succession opened at the death of the daughter without issue, which happened in the year 1879. By that time *Harbaghat* was dead, and the two nearest collaterals were the son of *Harbaghat*, who is the Plaintiff, and his cousin *Jubraj*; those two being both sixth in descent from the common ancestor of themselves and *Pirthi Pal*. But *Jubraj* comes of a branch senior to the branch of the Plaintiff; and therefore, if the estate can only go to one, it will go to that one who represents the senior branch.

Sir *Horace Davey* has suggested rather than argued on behalf of the Appellant that in a case of distribution ordered by the 11th sub-section of the 22nd section of the Act of 1869, the family custom is not to be taken into account. Their Lordships consider that the effect of the 11th sub-section is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted. That law clearly takes in the family custom, and that law will in this case carry the estate to the one single heir, and that single

J. C. 1893 NARINDAR BAHADUR SINGH v ACHAL RAM.

heir must be pronounced to be *Jubraj* in preference to the Plaintiff.

Their Lordships have not got *Jubraj* before them, and do not know whether there are other claimants; but the Plaintiff's own evidence shews that *Jubraj* comes in before him, and therefore the Plaintiff cannot maintain this suit.

The result is, that their Lordships will humbly advise Her Majesty that this appeal must be dismissed with costs.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondent: *Barrow & Rogers.*

J. C.* 1893 *Jan* 26, *Feb* 18.

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } APPELLANT;

AND

SHANMUGARAYA MUDALIAR AND OTHERS RESPONDENTS.

AND THE CROSS-APPEAL.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Land Acquisition Act (*X. of* 1870)—*Expropriation of Temples—Principle of assessing Compensation.*

In assessing the market value of land taken under the *Land Acquisition Act* (X. of 1870), *held* (1.) that twenty-five years' purchase at a rent fairly estimated ought not to be reduced in appeal to fifteen years' purchase at a rent paid for a part without reason assigned; (2.) that the Appellate Court was wrong in giving to the zemindar compensation for the loss of earnings by those employed on the land, they not being interested in the land, and the zemindar not being interested in their earnings or the loss of them. Under sect. 42, 15 per cent. on the sum awarded must be paid if the award has omitted that addition.

CONSOLIDATED CROSS-APPEALS from a decree of the High Court (May 3, 1889), whereby an award of the District Judge of *Chingleput* (March 12, 1888), made under the provisions of the *Land Acquisition Act* (X. of 1870) was varied in favour of the Respondents.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The facts are stated in the judgment of their Lordships.

The District Judge found that the zemindar *Ramasami* had in 1881 leased out the right to quarry stone in a certain portion of the rocks at Rs.140 per annum. He thought that for the right to quarry anywhere on the hills the rental might fairly be raised to Rs.200, and he was of opinion that twenty-five years' purchase would be a proper price to pay; so he assessed the compensation payable in respect of the acquisition at Rs.5000, to which he added Rs.124 15*a.* as the value of the land not containing stone fit for quarrying; and he accordingly awarded Rs.5124 15*a.* as the compensation to be paid, the tribute or revenue being reduced, as allowed by the Collector, by Rs.12 8*a.* 10*p.* a year, and he further directed that each party should bear his or their own costs.

The High Court dealt with compensation in this way :—

Wilkinson, J., held that as the zemindar had been able to let the land on lease for five years at Rs.140 a year, that might be accepted as his rent, and that he ought to be awarded fifteen years' purchase at this rate as compensation, making the award on this head Rs.2100.

He then proceeded as follows :—

"That the acquisition will injuriously affect the profits derived from working the quarries cannot be denied. It is argued that the Judge has sufficiently taken this into account. The Judge has altogether omitted to notice the evidence on the record as to the actual profits earned by the persons who work the quarries."

He then found upon the evidence that a quarryman could quarry in a year stone of the value of Rs.300, and that the quarryman's profit on that stone would be Rs.100; and further, that on this property there were about forty-six persons who earned their livelihood by quarrying, and he proceeded as follows: "The amount of profits of which the claimant would annually be deprived may, therefore, be set down at Rs.4600. There is nothing in the record to shew that the supply of stone which commands a market value is unlimited, and the market must always be a fluctuating one. *Mahabalipuram* is a long way from *Madras*, and, though there is a market, it does not appear to be a very lively one. Under these circumstances I would

J. C. 1893

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHANMUGAIAYA MUDALIAR.

allow ten times the annual loss, or Rs.46,000, for the damage sustained by the persons interested, by reason of the acquisition injuriously affecting their property or earnings.

"In addition to this, there is the market value of the land, *plus* the 15 per cent. which has to be added under sect. 42, and which has been overlooked by the Judge and the Sub-Collector. The amount fixed by the Sub-Collector is Rs.124 15*a.* 5*p.* It is not disputed.

"The total amount of compensation to be awarded will, therefore, be Rs.48,224 15*a.* 5*p.*, *plus* 15 per cent., or Rs.55,458 11*a.* 3*p.* Appellants are entitled to their costs in the District Court, and to proportionate costs of this appeal."

Shephard, J., agreed with his colleague that no value could be put upon the temples, and also as to the amount to be awarded; but he thought that the mode in which that amount had been arrived at was not right, and he proceeded as follows: "In my opinion no question arises with respect to loss of earnings for which compensation could be awarded under clause 3 of sect. 24. It is the market value of the property taken, which alone we are concerned to ascertain, and it is only for the purpose of ascertaining it that the earnings have to be considered. Indeed, with such materials as we have before us, the only way it seems to me of ascertaining that value is to take the aggregate of the profits or earnings derived from the land and capitalize it at so many years' purchase.

"Having regard to the evidence adduced as to the profits derived from the land, which evidence is really not contradicted, I think that the sum named by *Wilkinson*, J., will be adequate, and not excessive, compensation to the Appellants and other persons claiming an interest in the land. The Appellants are entitled to their costs in the Court below and proportionate costs in this Court."

Branson, for the Appellant, contended that the only question before the High Court was the market value of the land. There were three sets of claimants, the zemindar, forty-two Mirasidars, and the priest of the temple. The High Court had no right to enter into the question of the earnings of parties not before them

and not interested in the land, and give compensation for their loss of earnings to parties not damaged in any way by such loss. Upon the principle on which the High Court ought to have awarded compensation, he referred to *Penny* v. *Penny* (1) and *Cripps* on Compensation, p. 139.

Mayne, for the Respondents, who were also cross-Appellants, contended that both Courts were wrong in holding that no compensation should be allowed in respect of the antiquities. There is nothing in the record which gives any idea of the character or extent of the antiquities, whose existence led to the expropriation out of which these appeals arise. No doubt all the Judges who dealt with the case were personally familiar with the locality. They are fully described in Dr. *Hunter's* 'Imperial Gazetteer of *India*' (2nd ed.) vol. ix. pp. 143–148, under the head of *Mahabalipur*. He says: "This is one of the most interesting, and to archæologists one of the most important, spots in Southern *India*." "The antiquities of the place may be divided into three groups. (1.) The five raths to the south of the village, belonging probably to the latest Buddhist period; (2.) the cave temples, monolithic figures, carvings, and sculptures west of the village, probably of the sixth or seventh century A.D. (these contain some marvellous *relievos* ranking with those of *Ellora* and *Elephanta*); (3.) the more modern temples of *Vishnu* and *Siva*, the latter being washed by the sea. To these two and five others, buried (according to tradition) by the sea, the place owes its English name, *The Seven Pagodas*." The raths are minutely described and figured by Mr. *Fergusson* in his 'History of Architecture,' vol. ii. pp. 502–4. It was contended that the Courts below were wrong in holding that no value can be given to these antiquities as such, and that they must be treated for the purpose of compensation as so much rough granite. He claimed Rs.25,800.

It was further submitted that the valuation of the stone was inadequate; that the true principle was to estimate the market value of the stone available for use—that is, its selling price after deducting the cost of getting it; that, after making all possible allowance for the nature of the demand, the sum arrived

(1) Law Rep. 5 Eq. 227.

J. C. 1893

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHANMUGARAYA MUDALIAR.

at would not be less than that fixed by the assessor, namely, Rs.113,000.

Further, an additional 15 per cent. on the amount awarded was due to the Respondents under the Act: see sect. 42.

Branson, replied.

1893. Feb. 18. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

These appeals arise from the circumstance that the Government of *India* is desirous of saving from destruction, and of preserving as public monuments, certain works in the vicinity of *Madras* known as *The Seven Pagodas of Mahabalipuram*. The works are on the open sea beach, and they are constructed out of a small extent of granite hill which lies exposed at that spot. They consist partly of raths or monolithic temples completely disengaged from the hills, partly of caves cut into the living rock, and partly of figures carved upon its face. The place is very celebrated. *Fergusson* speaks of it as "more visited and more described than any other place in *India*." One gigantic rock-carving he describes as "the most remarkable thing of its class in *India*." He speaks of the raths as "the oldest examples of their class," and ascribes them to the fifth or sixth century A.D. *Crole* thinks they are several centuries older than that: perhaps belonging to the second century B.C. Whatever their origin, there is no doubt of their historical interest and value, or that the destruction of them would be a public misfortune.

The hills supply granite of good quality, for which there is some demand in *Madras*, and it has been quarried for many years past. No injury to the monuments was anticipated from the original style of working; but when the zemindar took to blasting, the local authorities felt alarmed and advised the Government to interfere.

The zemindary belongs to a joint family, who may be called the *Mudaliars*. In the year 1885 some negotiations for the purchase of the property took place between the Government and the then head of the family, who was willing to sell at a

very moderate price; but those may be passed over, because the Government was advised that no satisfactory title could be procured in that way, and that it was better to proceed under the *Land Acquisition Act* (X. of 1870).

The notices required by that Act were given, and the matter came before the Sub-Collector of the district, who, under the provisions of the Act (sects. 15 and 18), referred the question to the District Court. The terms of the reference shewed the properties which the Government sought to take, and the offer and claims made in respect of them. The *Mudaliars* claimed an exclusive right to the lands, and demanded upwards of 9½ lacs of rupees as compensation. Another class of villagers, called Mirasidars, denied that the *Mudaliars* had any right in the bulk of the lands, apparently those parts where granite could be quarried, and asserted their own exclusive right to them, and demanded upwards of Rs.30,000. A priest, or custodian of a temple, was stated to claim a large compensation; but by his statement in the record he does not claim anything except leave to use the blocks called mandapams. The Sub-Collector offered Rs.190 13*a.* 11*p.* for the whole.

When the parties came before the District Judge, they agreed that the inquiry should be confined to determining the value of the property. Therefore nothing was then decided as between the rival claims of the zemindars and the Mirasidars. The claims for compensation were reduced by the claimants' assessor to Rs.25,800 for the temples and works of art, and Rs.113,800 for the unquarried stone. For the carvings and temples the District Judge allowed nothing, as he found that they never had been, and never were likely to be, a source of any income. The claim for stone, reduced as it was, he considered to be still highly exorbitant. It was arrived at by estimating the contents of the hills at about twenty-five millions of cubic feet. Putting the value of one rupee on each hundred feet, as the claimants did, a much larger sum than Rs.113,000 is brought out. How the claimants' assessor effected the reduction to the latter sum does not clearly appear. Nor is it of much importance to know, because no evidence was given to enable the Court to judge of the rate at which the stone was being carried to market, and no

J. C. 1893

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHANMUGARAYA MUDALIAR.

details serving to shew what part of the market price should be attributed to the ownership of the stone, as distinguished from the labour bestowed on preparing it and carrying it to market.

The District Judge found that the only evidence available to him of the value of the ownership was a lease by which the zemindar had granted the right of quarrying over portions of the hills for five years, at the rent of Rs.140 a year. He found that at the same rate a right of quarrying over the whole area might command a rent of Rs.200. On this sum he allowed twenty-five years' purchase, bringing out the sum of Rs.5000 as the value of the stone. A further sum of Rs.124 15*a.* was added for some small plots, the price of which was not in dispute. It was also agreed that the zemindar's peshcush should be reduced, and that he should have liberty to remove the trees growing on the ground. The District Judge's award proceeded on these grounds, and further directed that each party should bear his own costs.

It is agreed that on the point of costs the award is erroneous, because the sum awarded exceeded the sum tendered by the Collector, and in that case the 33rd section of the Act directs that the costs shall be paid by the Collector.

It is also pointed out that the award does not give the additional 15 per cent. on the market value, which is directed by sect. 42 of the Act to be paid by the Collector. It is a matter of very little importance, but according to the exact terms of the Act the award is only to ascertain the market value, and then the Act itself imposes a further obligation on the Collector to pay the 15 per cent. The effect is the same whether the award is silent about the added percentage, or expressly includes it, as has been done by the High Court.

There is no reason to suppose that the award would not have been put into correct shape on application to the District Judge. But all parties were dissatisfied with the principle of his valuation. The *Mudaliars* appealed to the High Court, and the Government met their appeal by objections in which they adhered to the original offer of the Collector. No appeal was presented by the Mirasidars. Their Lordships have been informed by the counsel of the parties that in a subsequent

proceeding it has been decided that the claim of the Mirasidars is not well founded.

The case was heard by Mr. Justice *Wilkinson* and Mr. Justice *Shephard*. As regards the temples and carvings, they both agreed with the District Judge that they have no market value. It is highly improbable that they should have any. No evidence was offered to shew that there is any; and Mr. Justice *Wilkinson* adds that the claimants' counsel did not assist the Court by suggesting any price which might be offered as a fancy price. Their Lordships find themselves in a like position with the High Court, and all they can do is to express agreement with the Courts below on this point.

With respect to the stone, Mr. Justice *Wilkinson* thought that the District Judge had awarded too much in respect of the zemindar's rent. He thought that the basis of calculation should be the actual rent of Rs.140 instead of the estimated rent of Rs.200; and that instead of twenty-five years only fifteen should be allowed. That cuts down the market value to Rs.2100.

On the other hand, the same learned Judge held that the District Judge had erred in omitting to notice the evidence as to the actual profits earned by the persons who work the quarries. He refers to evidence shewing that there are about forty-six persons in the village who earn their livelihood by stone-quarrying; and, calculating their annual profits at Rs.100 apiece, he concludes that the amount of profits of which the claimants would annually be deprived may be set down at Rs.4600. On this amount he allows ten years' purchase, and so brings out a sum of Rs.46,000, which he says is the damage sustained by the persons interested by reason of the acquisition injuriously affecting their property or earnings.

Mr. Justice *Shephard* agrees with his learned colleague as to the amount of compensation, but not in his reasoning. He says that no question arises with respect to loss of earnings under clause 3 of sect. 24 of the Act. But he adds that the only way of ascertaining the market value is to take the aggregate of the profits or earnings derived from the land and to capitalize it.

By their decree the High Court altered the award of the District Judge by substituting the sum of Rs.55,458 11*a*. 3*p*.

J. C. 1893

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHANMUGARAYA MUDALIAR.

(which includes the additional 15 per cent.) for the sum of Rs.5124 15*a.*; and by ordering the Respondent to pay the costs of the claimants in the District Court; they also ordered him to pay a proportion of the costs in the High Court. From that decree the present appeals are brought.

It appears to their Lordships that the District Judge was right in estimating a rent for the whole of the lands, instead of taking the rent actually received for part. It was the best, if not the only, method he had for getting at the market value of the ownership. As regards the number of years' purchase, though it seems large, no reasons are given why it was fixed on, nor why the High Court took a much smaller period; and their Lordships see no cause for departing from the opinion of the District Judge, who had all the parties and their agents before him. They therefore agree with the District Judge as regards the value of the zemindar's interest calculated on the footing of the rental.

In estimating the price of the stone, it seems to them that the two learned Judges, though differing in language, have in effect followed the same principle. Each has included the earnings of the quarrymen, and the estimated loss of those earnings, as an element in the compensation. Whether they are included directly as earnings injuriously affected, according to one Judge, or indirectly as swelling the market value, according to the other, the result is the same. Their Lordships are of opinion that an erroneous principle has been introduced by the High Court. No compensation is tendered by the Collector or ordered by the Act, except to persons interested in the land. If the acquisition injuriously affects the earnings of the person interested, he is to obtain further compensation beyond the market value of the land. But no compensation is given to persons not interested in the land, on the ground that their earnings may be affected by the change of ownership, or indeed on any ground. The forty-six quarrymen are no more interested in the land than a ploughman or a digger is interested in the land on which he works for wages. Nor are their earnings the earnings of the zemindar, who is interested. The market value of a property is not increased by the circumstance that a number of persons work

on it and so earn their livelihood. That is no profit to the owner; it may be expense to him. And the award of the High Court has the extraordinary result of putting a large sum into the pocket of the *Mudaliars* on the ground that some of their neighbours will be injured by losing their employment.

The conclusion is that the High Court have been mistaken in departing from the principles which the District Judge followed in assessing compensation, and that his award should in substance be reinstated. It will suffice if the decree of the High Court is varied by inserting the figures Rs.5124 15*a.* instead of the figures Rs.55,458 11*a.* 3*p.*, and with that variation affirmed. That will leave the original award as to market value standing, and will also leave standing the directions of the High Court as to payment of costs. The Collector will, of course, have to pay 15 per cent. on the sum awarded according to the provisions of sect. 42 of the Act before he can make his title perfect. With respect to the costs of these appeals, their Lordships think it right that each party should bear his own. They will humbly advise Her Majesty in accordance with these opinions.

Solicitor for Appellant: *Solicitor to the India Office.*
Solicitor for Respondents: *R. T. Tasker.*

J. C.*
1893
May 13.

Ex parte MACREA.

FROM THE HIGH COURT FOR THE NORTH WESTERN PROVINCES, ALLAHABAD.

Practice—Leave to Appeal in Criminal Case refused—Indian Penal Code, s. 511.

Although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection by a Judge, either in leaving a case to a jury where there is no evidence or founded on an incorrect construction of the Penal Code, even if established, is insufficient for that purpose, especially where no miscarriage of justice has resulted.

THIS was a petition for special leave to appeal from a conviction by the High Court, dated the 13th of June, 1892, under sects. 511 and 420 of the Penal Code.

It stated that the Petitioner had been convicted of (1.) an attempt to cheat and thereby fraudulently to induce the Comptroller-General to deliver to him or to *Asad Ali* a Government promissory note, No. 9764, for Rs.500, and pay the accrued interest thereon; (2.) conspiracy with *Asad Ali* with that object; (3.) abetment of an attempt by *Asad Ali*; and had been sentenced to two years' rigorous imprisonment.

An application had been made on the 1st of December, 1892, under sect. 32 of the High Court Charter of 1866, that the Petitioner's case might be declared a fit and proper one for appeal to Her Majesty on the ground that the jury had been misdirected to the effect that the acts covered by the evidence amounted to an attempt at cheating within the meaning of the Penal Code, and had been refused.

The charge related to a lost Government promissory note for Rs.500, No. 9764, with arrears of interest thereon from 1865, which belonged to the representatives of one *Mirza Husain Ali*, and was to the effect that the Petitioner had attempted to cheat by applying in writing to the Comptroller-General on the 17th of June, 1891, and doing other acts between the 17th of June

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

and the 20th of October, 1891, at *Lucknow*, to deceive him into the belief that the same belonged to *Husain Ali* deceased (brother of *Asad Ali*), and thereby dishonestly inducing the Comptroller-General to pay him or *Asad Ali* the accrued interest, and deliver to one or other a duplicate of the said note.

The petition stated that no evidence was laid before the jury that an application had ever been made by or on behalf of the Petitioner either orally or in writing to the Comptroller-General that the arrears of interest should be paid, or the duplicate note delivered, or that any initial steps should be taken in the Public Debt Office towards such payment or issue; that on the contrary a witness who had been at the time superintendent of that office deposed that no communication had been received from the Petitioner on which such payment or issue could have been made. It also stated that the evidence adduced was directed to prove the said false representation to the Comptroller-General, and that inquiries had been made by the Petitioner at the Public Debt Office whether the said note was outstanding or not, and that the Petitioner had caused letters of administration to *Husain Ali* deceased to be issued reciting that note No. 9764 belonged to his estate, that he requested the police authorities to investigate the alleged loss, and produced to them a copy of the lost note, and also sent such copy, together with a copy of the letters of administration, to the *Exchange Gazette* for publication.

Knox, J., who presided at the trial, directed the jury that, besides being satisfied of the Petitioner's intention to cheat, they must be satisfied that he had done acts towards such cheating sufficiently important for the law to take notice of, and sufficiently near to the act of cheating intended and contemplated, and that upon the question of proximity they must consider whether those acts were sufficient to excite reasonable apprehension that the act attempted would be carried out and accomplished with the intention to cheat.

In refusing the Petitioner's application for leave to appeal, *Knox*, J., stated that "there appears to be a wide difference between the meaning of the werd 'attempt' as understood by English lawyers in the phrase 'attempt to commit a felony' and

J. C 1893 *Ex parte* MACREA

the word 'attempt' as actually defined in the Indian Penal Code." *Blair*, J., agreed that sect. 511 uses the word "attempt" in a very large sense, and held that the Petitioner's acts bore and were intended to bear upon the mind of another person, that that mind was left to operate, that consequently acts were done towards deceiving in a case where deception would operate as an inducement to deliver within the meaning of the Code, and amounted to an attempt, "even though a further act of deception did not follow, which might probably have been required to complete the offence of attempt within the meaning of English law."

Cowell, and *Bodkin*, in support of the petition, submitted that leave should be granted, on the ground that substantial and grave injustice had been done. There had been misdirection founded on an entirely erroneous construction of sect. 511, which led to a conviction, in the complete absence of any evidence to the effect that there had been an attempt to cheat. Unless the Judge had withdrawn that part of the case from the jury, they should have been instructed to consider whether there was any act on the part of the Petitioner which began the execution of an intention to cheat. The Penal Code does not render him punishable under sects. 511 and 420 for acts which merely tend towards such beginning, or which shew that, unless interrupted, he may possibly begin such execution. There is a broad distinction recognised by the Code between preparation and attempts: see sects. 399, 393, 402 as to the former, and sects. 307 (*c*) and (*d*) as to the latter. Even if the Penal Code uses the word "attempt" in sect. 511 in any different sense from that applied to it by English law, still it was not intended by the Code to obliterate the distinction between acts which amount to preparation for and acts which begin the execution of an offence. Here the evidence shewed that the Petitioner had not performed a single act which rendered it possible for the Comptroller-General to deliver up any property in his control. No application had been made to that effect; and if it had been made, many other acts would have to follow before the offence could have been completed. Attempt was not made till at least there had been an

application, for before the act of applying completion of the offence was totally impossible. Other High Courts have not taken this entirely novel view of the word "attempt": see *Queen Empress* v. *Riasut Ali* (1); *In re Cassidy* (2); *Queen Empress* v. *Dhundi* (3). As to the English view of "attempt," see *Eagleton's Case* (4), and *Reg.* v. *Cheeseman* (5). As this erroneous construction, creating a new offence unknown to the Code, has been affirmed by the Bench which refused leave to appeal, and as sect. 511 applies to nearly every offence created by the Penal Code, the Petitioner's case is one of general importance, and excepted from the stringent rule which prevents criminal appeals. Reference was made to *In re Dillett* (6); *Macleod* v. *Attorney-General for New South Wales* (7); *Reg.* v. *Bertrand* (8).

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

Their Lordships are of opinion that leave to appeal ought not to be granted in this case.

The ground upon which leave is asked is that the Petitioner, being indicted under the 511th section of the Indian Penal Code for an attempt to cheat, there was no evidence of an attempt to cheat, but only of preparation for such an attempt.

Sect. 511 provides that "whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence" shall be punished in the manner therein directed.

The facts are that the Petitioner had obtained, with a fraudulent intent, as must be taken to be the fact after the finding of the jury, letters of administration to be granted, which recited that a certain lost Government promissory note was the property of one *Asad Ali*, and that further he had with fraudulent intent

(1) Ind. L. R. 7 Calc. 352.
(2) 4 Bomb. H. C. Cr. 17.
(3) Ind. L. R. 8 Allah. 304.
(4) Dearsley, 538.
(5) Leigh & Cave, 140.
(6) 12 App. Cas. 459.
(7) [1891] A. C. 455.
(8) 4 Moore's P. C. (N.S.) 474, 475.

J. C. 1893

Ex parte MACREA.

sent those letters of administration to the Public Debt Office as the foundation for an application for payment of the money.

The learned Judge who tried the case laid down in his charge to the jury that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned Judge clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence.

The jury found the Petitioner guilty. Their Lordships see no reason to believe that there was any misdirection on the part of the learned Judge, or that there has been a miscarriage of justice. But they do not desire to dispose of the petition simply upon that ground. If there be any foundation for this application, it rests upon this—that the learned Judge did not in his charge to the jury correctly construe the 511th section of the Penal Code, or that he left the case to the jury when there was no evidence to go to the jury. In their Lordships' opinion, if they were to sanction an appeal in the present case, it would be very difficult to refuse leave to appeal in all cases in which it could be established that there had been a misdirection by the Judge who tried the case. There are, no doubt, very special and exceptional circumstances in which leave to appeal is granted in criminal cases; but it would be contrary to the practice of this Board, and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be shewn that the learned Judge had misdirected the jury.

Solicitors for Petitioner: *Ranken Ford, Ford, & Chester.*

RAJAH NILMONI SINGH . . . . . PLAINTIFF; J. C.*

AND 1893

KIRTI CHUNDER CHOWDHRY . . . . DEFENDANT. *Mar.* 15, 16; *April* 28.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Practice—Concurrent Findings of Fact.

In a suit for an account against a mokhtar and cashier, it appeared that the Plaintiff had executed a deed of release on the 22nd of April, 1884, founded on an alleged adjustment of accounts, and that on the 8th of May, 1885, the Defendant had signed a document stating that there had been no such adjustment, and that he was willing to account which document he had unsuccessfully sued to set aside :—

Held, that concurrent findings of fact to the effect that the release was a genuine document, that it had been preceded by a detailed examination of accounts made on behalf of the Plaintiff, and that the Defendant had used no unfair means to obtain it, disposed inferentially of the document of the 8th of May, 1885, and was fatal to the suit.

APPEAL from a decree of the High Court (Nov. 26, 1889) affirming a decree of the Subordinate Judge of *Purulia* (Aug. 22, 1889) which gave to the appellant a partial decree.

The facts are stated in the judgment of their Lordships.

Doyne, and *Branson*, for the Appellant.

Mayne, for the Respondent, was not heard.

The judgment of their Lordships was delivered by 1893

April 28.

LORD WATSON :—

In this appeal, the written pleadings in the Courts below do not clearly indicate the real nature of the controversy between the parties. In order to explain their relative positions, it is necessary to advert to certain facts which must now be accepted, because they are either matter of mutual admission or have been affirmed by concurrent judgments.

The Respondent, *Kirti Chunder*, acted at *Purulia* as the mokhtar and cashier of the Appellant, the *Rajah Nilmoni Singh*,

* *Present* :—LORD WATSON, LORD MORRIS, and SIR RICHARD COUCH.

J. C. 1893

RAJAH NILMONI SINGH v. KIRTI CHUNDER CHOWDHRY.

from the 23rd of June, 1877, until the 10th of May, 1885, when he resigned his office.

On the 22nd of April, 1884, a deed of release was executed by the Appellant in favour of the Respondent, which sets forth that one *Sita Churn Biswas* had, by direction of the Appellant, examined the Respondent's accounts and found that no balance was due, and accordingly exonerates the Respondent from all liability in respect of all that he had done, and all matters connected with moneys realized and expended from the date of his appointment as mokhtar and cashier until the 10th of April, 1884. *Sita Churn* was, at that time, the chief clerk in the employment of the Appellant; the deed, which bears the seal of the Rajah, is in his handwriting.

In June, 1884, *Sita Churn* was dismissed upon a charge of dishonesty. After a considerable lapse of time, a rumour reached the Appellant to the effect that *Sita Churn* had been tampered with, and had been induced to report, contrary to the fact, that no balance was due upon the Respondent's accounts. He thereupon summoned the Respondent, who was still in his service, to appear before him on the 8th of May, 1885. On that occasion the Respondent signed a document addressed to the Appellant, in which he states that there had been no examination or adjustment of his accounts, and professes his willingness to render an account from the day of appointment up to date. The document assigns no reason for its execution, and no consideration was given for it.

On his leaving the Appellant's service, the Respondent at once brought an action to have the writing of the 8th of May, 1885, declared null and void, on the ground that it was obtained from him by threats and coercion. That suit was, on the 31st of August, 1885, dismissed by the Deputy Commissioner of *Manbhoom*, whose judgment was subsequently affirmed by the Judicial Commissioner, and also by the High Court.

This action was brought by the Appellant in March, 1886, for a general accounting from the date of the Respondent's appointment in 1877, until the 10th of May, 1885, and for payment of Rs.50,000, or such other balance as might be ascertained upon inquiry. The plaint makes no allusion to the release of the 10th

of April, 1884; but it refers in vague and general terms to the document of the 8th of May, 1885, and the Respondent's unsuccessful attempt to set it aside. In his written statement the Respondent urged various preliminary pleas; but on the merits his main defence was that the Appellant's demand for an accounting for the period antecedent to the 10th of April, 1884, was excluded by the release of that date. He also pleaded that, inasmuch as his suit to set aside the writing of the 8th of May, 1885, was dismissed on the ground of insufficiency of proof, the decree in that suit could not be used as evidence against him.

Of nine issues adjusted in order to try the merits of the cause, one only was noticed in the argument addressed to this Board, because the answer given to it constitutes the foundation of both judgments appealed from. It is in these terms:—

"1st. (*a*) Has the Defendant (Respondent) rendered to the Plaintiff (Appellant) accounts of all receipts and expenditure of moneys, stamps, and other moveable properties up to the end of 1290 (10 April, 1884); and did the Plaintiff (Appellant) give him a discharge from all liabilities up to that year exclusive?"

The Subordinate Judge, and, on appeal to the High Court, *Norris* and *Macpherson*, JJ., have answered that issue in the affirmative, except in so far as it relates to stamps and documents which came into the Respondent's hands during the period in question, which, in their opinion, were not covered by the terms of the deed of release.

Their Lordships do not doubt that, if an issue in these terms had been submitted to the consideration of a jury, it would have been necessary for the presiding Judge to give them some directions as to the legal construction of the documents bearing upon it, and as to the legal principles by which they were to be guided, all questions of fact being left to their disposal. It is obvious that the Appellant cannot succeed, unless he is able to shew, either that the inferences of fact drawn by the learned Judges are manifestly wrong, or that they have erred in law by misconstruction of documentary evidence, or by misapplication of legal principle to the facts found by them. It cannot detract from the weight of concurrent findings of fact, that different Courts, in arriving at the same result upon the same evidence,

J. C. 1893 RAJAH NILMONI SINGH v. KIRTI CHUNDER CHOWDHRY.

have not been influenced by precisely the same considerations. A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference.

Notwithstanding the ingenious argument addressed to them by Mr. *Doyne* on behalf of the Appellant, their Lordships have been unable to discover that the answer given to the issue by either of the Courts below is wrong in fact or tainted with legal error. The case presented by the parties respectively, upon their pleadings and proof, though it raised some curious considerations of fact, left little room for legal subtleties. The Respondent resisted an accounting on the ground that his accounts had been examined and passed, and that he had got a discharge. The Appellant, on the other hand, disputed the genuineness of the discharge, and relied upon the ikrar of the 8th of May, 1885, as shewing conclusively that there had been no examination of accounts, and that no release had ever been granted. These were questions of fact, and of fact only; and neither of the parties gave the Courts much assistance in determining them. Neither the Appellant nor the Respondent was examined as a witness, and *Sita Churn Biswas* was not called by either of them. In the absence of their testimony, both Courts were satisfied that the release of the 22nd of April, 1884, was a genuine document; that it had been preceded by a detailed examination of the Respondent's accounts, made on behalf of the Rajah; and that the Respondent had used no unfair means to obtain it.

These findings appear to their Lordships to be conclusive against the case set up by the Appellant, and to deprive of all value the document of the 8th of May, 1885, upon which he relied. It necessarily follows from them that the statements in that document, in respect of which the Respondent professes his willingness to account, are absolutely false. It is true that the Respondent has failed to establish that the document was extorted from him by compulsion; and that he has not explained why he signed it. In petitioning for leave to appeal the Appellant represented to the High Court that, as matter of law, the *onus* was upon the Respondent of explaining the circumstances

in which he executed the document, and that he had failed to discharge it. The same argument was pressed here; but, in their Lordships' opinion, that question of *onus* becomes very immaterial when it is found that the release of the 22nd of April, 1884, was valid. In that case, the *onus* is as much upon the Appellant to shew why he accepted a document which he knew, or ought to have known, to be a tissue of falsehoods, as upon the Respondent to explain what induced him to sign it.

Their Lordships will humbly advise Her Majesty to affirm the judgments appealed from. The Appellant must bear the costs of this appeal.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondent: *Miller, Smith, & Bell.*

ISMAIL ARIFF . . . . . PLAINTIFF;

AND

MAHOMED GHOUSE . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Injunction against Trespasser—Title to Possession—Wakf.

In a suit for a declaration that the Plaintiff was absolute owner of the land in suit and for an injunction, the defence was that the land was subject to a wakf created by the Plaintiff's predecessor in title, and that the Defendant was mutwali thereof. Both Courts found in favour of the Plaintiff's possession, and that the Defendant was not the mutwali nor possessed of any interest in the land, but differed as to the dedication:—

Held, that the Plaintiff was entitled to a declaration as against the Defendant that he was lawfully entitled to possession and the relief consequent thereon. It was unnecessary to decide as to the validity of the wakf for the purposes of the suit or in the absence of the parties interested.

APPEAL from a decree of the High Court (July 27, 1888) reversing a decree of Mr. Justice *Trevelyan* (March, 27, 1888), which had decreed the Appellant's suit with costs. The plaint alleged that the Appellant was absolute owner of the property

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

J.C. 1893

ISMAIL ARIFF v. MAHOMED GHOUSE.

in suit under a conveyance in 1885 from *Baba Saheb*, that upon the execution thereof the vendor had duly made over possession to him, but that four of the tenants refused to acknowledge the title of the Appellant or of his vendor, and had set up, in collusion with the Respondent, a title in the latter as mutwali of the land, which they alleged had been made wakf, or dedicated to religious or charitable purposes. It prayed in its first and second paragraphs:—

(*a*) That it may be declared that the Plaintiff is sole and absolute owner of the land, that the same is not dedicated for religious or charitable purposes, and that the Defendant has no sort of right, title, or interest therein or in any part thereof.

(*b*) That an injunction should issue restraining the Defendant's interference with the Plaintiff's possession.

In answer, the Respondent denied the title of *Baba Saheb*, or that he had delivered possession to the Appellant, and pleaded, that the land had belonged originally to one *Sheik Khubulla*, a Mahomedan, who had by deed of wakfnamah (which on the face thereof was called a wasiatnamah or will) granted and dedicated the same "for the purpose of defraying the expenses of lighting and doing the repairs of a certain mosque in mouzah *Bara Bati*, and the support of travellers, mendicants, &c., and widows residing in the house," and had further directed that his five sons should in yearly rotation act as mutwalis of the said endowed land.

2ndly. That after the death of *Khubulla*, *Ramjanullah*, the eldest son of *Khubulla*, had by a deed of wakf confirmed his father's wakfnamah.

He also alleged that he had been appointed mutwali, and submitted that *Khubulla* and *Ramjanullah* had created a valid wakf in respect of the land, and that the Appellant by his alleged purchase had acquired no title or interest therein.

The judgment of Mr. Justice *Trevelyan* was as follows:—

"Unless there is now a valid and subsisting wakf to which this property is subject the Defendant's title, apart from other objections to it, fails.

"In the view which I take of this case, it is not, I think, necessary for me to decide whether or not the wastitnamah of

Khubulla and the wakfnamah of *Ramjanullah* created trusts which are now valid and subsisting; but as evidence has been taken and there has been much discussion on the subject, I think I ought to make the following observations.

"I think it is clear law that the mere fact of the execution of a document which purports to devote land to religious or charitable uses does not preclude a person contesting the operation of the trusts of such document from contending that the so-called wakf was a device for the purpose of providing for the wakif's family. The question is, whether the endowment is a nominal one or a *bonâ fide* one.

"Owners of property have in *India*, as in other countries, frequently been anxious to prevent their descendants from alienating their property, and in this country the means attempted to be used for this purpose have often consisted of so-called deeds of endowment. This has been the case with both Hindus and Mahomedans.

"If a settler settling property by means of a so-called deed of endowment is simply and solely intending to benefit his family, and only uses the form of a religious trust for the purpose of benefiting that family, and of preventing the property from being alienated by his descendants or from being seized and sold at the instance of creditors of his descendants, then the endowment is, I think, not real, but sham.

"For the purpose of ascertaining whether the endowment is real, one may, I think, look not only at the document itself, but one may also see how the settler himself and his descendants after him have treated the so-called trust."

He then considered the evidence in the case, and, without deciding directly whether the language of the documents in evidence was effectual to create a valid wakf, he held that there was "nothing in the evidence to shew that these wakfnamahs were ever acted upon," and proceeded as follows:—

"*Ramjanullah* does not in his wakfnamah say anything to the effect that his father's wakfnamah was acted upon, and I think that the execution by *Ramjanullah* of his wakfnamah is a circumstance tending, though not very strongly, to show that *Khubulla's* wasuitnamah was not treated as creating a genuine wakf.

J. C. 1893 ISMAIL ARIFF v. MAHOMED GHOUSE.

"The brothers and their descendants received the rents of this property until the sale to *Baba Saheb*, and there is nothing to shew that the rents were applied for the purposes of the wakfs. If anything, the evidence is the other way. In 1873, long before there was any dispute as to this property, and before there was apparently any intention to sell it, we find the brothers, without making any mention of the wakf, giving to *Hafiz Mahomed Hossein* a mookhtearnama to collect the rents of this property."

He then found that the Defendant had shewn no title to interfere with the property, and that a deed of the 5th of June, 1882, under which he claimed to have been appointed mutwali, was an absolutely worthless deed.

The conclusion of the judgment was in these terms:—

"The question is this. Is the Plaintiff who purchased from some of the persons entitled, who received possession from the persons then in complete possession either for themselves or on behalf of themselves and others, and was actually, as I have found, in complete possession, entitled to have his rights declared as against a mere trespasser who, without any shadow of title, is contesting the Plaintiff's right?"

"I think he is, and I think that he is so entitled whether or not the will of *Khubulla* and the wakfnama of *Ramjanullah* created a good wakf.

"The Defendant has no title of any kind, and the Plaintiff has at least a title subject to the wakf."

He decreed in accordance with the first and second paragraphs of the prayer of the plaint.

The High Court (*Petheram*, C.J., and *Norris* and *Beverley*, JJ.) held with regard to *Khuballa's* will that it was in effect a deed of dedication, that the whole of the property was dedicated, that it could not under the circumstances be alienated by the heirs of *Khubulla*, and that, therefore, the Appellant had acquired no title to the said property.

As to the Defendant, they held that the evidence not only did not shew that he was mutwali of the said property, but in fact shewed that he was not such mutwali, and that he had not "any more interest in this property and any more right to inter-

fere with it than any coolie in the street, and his action in interfering with the tenants and in preventing them from paying the rent was absolutely illegal and absolutely unjustifiable upon the evidence."

They then considered the effect of sect. 42 of the *Specific Relief Act*, and were of opinion that the suit before them could not be maintained under that section, as the Plaintiff had shewn no title in himself.

They referred to the fact that the dedication of the property having been by will, it could only affect one-third thereof as the consent of the heirs had not been shewn; but they were of opinion that the suit had not been framed to obtain any declaration of such an interest as this finding would give to the Plaintiff, and that upon the facts proved the Plaintiff had shewn no title whatever, and that, therefore, the suit should have been dismissed, and they accordingly decreed the appeal and dismissed the suit, but allowed no costs on either side in any Court.

The Attorney-General (Sir *C. Russell*), and *Branson*, for the Appellant, contended that whether the alleged wakf had been validly created or not was not the question in this suit. The parties interested in that question were not before the Court and would not be bound by any decision made. The High Court ought to have held that the Appellant had such an interest in the land as entitled him to be protected in his possession as against the Respondent, who was concurrently found to have been a stranger and a trespasser. The Appellant had a right to a declaration, if not of absolute title, at least of a title which was good against the Respondent, and was also entitled to the injunction prayed.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal relates to land and premises in the town of *Calcutta*, which were purchased by the Appellant from one *Baba Saheb* and conveyed to him on the

J. C. 1893

ISMAIL ARIFF v. MAHOMED GHOUSE.

24th of September, 1885. *Baba Saheb* had purchased the property from the heirs of one *Khubulla*, the former owner, who died in 1852, and had taken conveyances from them, the first being made on the 2nd of December, 1881. He was then put in possession, the heirs having previously been in possession, and receiving the rents of the property. *Baba Saheb* remained in possession until the sale to the Appellant, who then received possession and had it when the suit was brought. Both these purchases were *bonâ fide*. The suit was brought by the Appellant, and the cause of bringing it is stated in the plaint to be that all the tenants of the property had attorned to the Plaintiff and paid rent to him except four, who, at the instigation of the Defendant, the Respondent in this appeal, had refused to recognise the Plaintiff's title, and alleged in collusion with him that the land had been dedicated to religious and charitable purposes, and that the Defendant was the mutwali thereof, and as such alone entitled to recover the rents; that collusive suits had been brought by the Defendant in the *Calcutta* Court of Small Causes against the four tenants, and decrees for possession obtained therein by consent or non-appearance; and the plaint prayed for a declaration that the Plaintiff was the sole and absolute owner of the land, that the same was not dedicated for religious or charitable purposes, and that the Defendant had no sort of right, title, or interest therein, and for an injunction and damages. The defence stated that the lands belonged originally to *Khubulla*, who, by a deed of wakfnamah dated a native date corresponding with the 3rd of May, 1850, granted and dedicated the lands for the purpose of defraying the expenses of lighting and doing the repairs of a certain mosque in mouzah *Bara Bati*, and for the support of travellers, mendicants, &c., and widows residing in the house, and by the deed further provided that his five sons therein mentioned should be the mutwalis in rotation every year; and that the Defendant had been appointed mutwali of the wakf lands and property. It also stated another wakfnamah by *Ramjanullah*, the eldest son of *Khubulla*, made about four years after his death.

The suit was heard by Mr. Justice *Trevelyan*, on the Original Side of the High Court at *Calcutta*. In his judgment, after a

careful examination of the evidence and a finding that the wakfnamah was executed by *Khubulla*, he said he had come to the conclusion that there was nothing in the evidence to shew that the wakfnamah was ever acted upon; that the brothers and their descendants received the rents of the property until the sale to *Baba Saheb*, and there was nothing to shew that the rents were applied for the purposes of the wakf; that in the view which he took of the case it was not, he thought, necessary for him to decide whether or not the wasuitnamah (meaning a dedication by will) and a wakfnamah made by one of the sons created trusts, which were valid and subsisting; but that, as evidence had been taken, and there had been much discussion on the subject, he thought he ought to make certain observations. The learned Judge appears not to have intended these observations to be a decision upon the validity of the wakfnamah. The actual judgment is contained in the passage at the end of the judgment, where the learned Judge says: "The question is this. Is the Plaintiff who purchased from some of the persons entitled, who received possession from the persons then in complete possession either for themselves or on behalf of themselves and others, and was actually, as I have found, in complete possession, entitled to have his rights declared as against a mere trespasser, who without any shadow of title is contesting the Plaintiff's right? I think he is, and I think that he is so entitled, whether or not the will of *Khubulla* and the wakfnama of *Ramjanullah* created a good wakf. The Defendant has no title of any kind, and the Plaintiff has, at least, a title subject to the wakf. I must make a decree in accordance with the first and second paragraphs of the prayer of the plaint." By the decree as drawn up, it is declared that the plaintiff is the sole and absolute owner of the land and premises in the plaint mentioned, "and that the same have not been dedicated for religious or charitable purposes, and that the Defendant has no interest therein or in any part thereof." It is to be observed that, according to the judgment, the decree apparently was not intended to declare that there had been no dedication. The Defendant appealed, and the case was heard before the Chief Justice and two other Judges. They were of opinion that there was a dedication, and that

J. C. 1893

ISMAIL ARIFF v. MAHOMED GHOUSE.

consequently the property could not be alienated by the heirs of *Khubulla* as their own; that the persons from whom "the Plaintiff" purchased had no title to convey; and that, although "the Plaintiff" had been in possession for the last six years, he had been in possession without title. The judgment proceeds as follows: "The position of *Mahomed Ghouse*, the Defendant, appears to be this. He claims to be the mutwalee, but the evidence upon this record, not only does not shew that he is the mutwalee, but it shews that he is not, so that, so far as *Mahomed Ghouse* is concerned, he had not absolutely any more interest in this property, and any more right to interfere with it, than any coolie in the street, and his action in interfering with the tenants and in preventing them from paying the rent was absolutely illegal, and absolutely unjustifiable upon the evidence as it appears before us. Then we have this state of things: we have a person in possession of this property for six years past without any title, and we have him wilfully, improperly, and illegally interfered with by a person who has no title himself. Under these circumstances, the Plaintiff claims relief under sect. 42 of the *Specific Relief Act*, and we then have to consider what his rights are under that section. That section, as I said just now, was passed for the purpose of enabling persons who have a title, and whose title has been threatened, to bring this action for the purpose of having that title declared, but such an action seems to us to be absolutely inappropriate in cases in which the person has no title whatever, because we cannot give a declaration of something that is untrue; we cannot declare that this person, the Plaintiff, has a title, when, as a matter of fact, it is shewn he has none."

It appears to their Lordships that there is here a misapprehension of the nature of the Plaintiff's case upon the facts stated in the judgment. The possession of the Plaintiff was sufficient evidence of title as owner against the Defendant. By sect. 9 of the *Specific Relief Act* (Act I. of 1877), if the Plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover

possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession. The Appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the Defendant may continue to wilfully, improperly, and illegally interfere with the Plaintiff's possession, as the learned Judges say he has done, and the Plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; that the Plaintiff was entitled in it to a declaration of his title to the land. It was not necessary for him to negative that the land was dedicated to religious or charitable purposes, a question upon which the Original and Appellate Courts have differed, and which, as the only Defendant was not entitled to maintain the wakfnamah, and other persons would not be bound by an adverse decision, their Lordships do not decide. That declaration should be omitted from the decree. Their Lordships will humbly advise Her Majesty to reverse the decree of the Appellate Court, and order the defendant to pay the costs of the appeal to that Court, and to affirm the decree of Mr. Justice *Trevelyan*, substituting for the words "the sole and absolute owner"—"lawfully entitled to possession," and after the words "in this suit mentioned," omitting "and that the same have not been dedicated for religious or charitable purposes." The Respondent will pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

J. C.*
1890
Nov. 20.
1893
Feb. 11.

SARJU PARSHAD . . . . . PLAINTIFF;

AND

BIR BHADDAR SEWAK PANDAY . . . DEFENDANT.

AND THE REVIVED APPEAL.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Benamee Purchases—Alienation by Benameedar—Consent of True Owner—Equitable Rights of Purchaser.

Where a benameedar purchased property with moneys borrowed from the Appellant, and afterwards mortgaged the purchased property to the Appellant to secure the debt, the Appellant being aware of the benamee character of the title, and the real purchaser being cognizant of the mortgage:—

Held, in a suit against the benameedar and the beneficial owner, that even if the mortgagor had not created a valid hypothecation of the property, still the Appellant was entitled in equity to a declaration that the sums advanced with interest were a charge thereon.

APPEAL from a decree of the High Court (June 3, 1887), reversing a decree of the Subordinate Judge of *Gorakpur* (Sept. 9, 1885).

The suit was originally brought by *Sarju Parshad*. The appeal was brought by his son *Bhagwati Parshad*, a minor under guardianship. After the appeal was heard in November, 1890, the Respondent *Bir Bhaddar Sewak Panday* died, and judgment was not delivered until after the appeal was revived against *Radha Kishen Sewak Panday* and another.

The question in the appeal was whether the Plaintiff was entitled to recover the amount of advances made to the Defendant and to bring to sale certain lands in possession of the Defendant which had been hypothecated as security therefor.

The facts are stated in the judgment of their Lordships.

Raikes, and *J. R. Dunlop Hill*, for the Appellant.

* *Present on the hearing of the Appeal*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND). *Present on the delivery of the Judgment*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The Respondent did not appear.

1893. Feb. 11. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

On the 7th December, 1864, one *Mewa Lal* obtained a decree for money against *Bir Bhaddar*, the predecessor of the Respondents, and one *Sat Narain*, in execution of which certain shares in certain villages were sold on the 20th of November, 1871, and were purchased by *Nandan Tewari* for Rs.12,325, of which Rs.9,000 were borrowed by him from *Sarju Parshad*, the father of the Appellant, in addition to Rs.5,000 previously borrowed. By a deed of hypothecation, dated the 3rd of December, 1871, *Nandan Tewari* mortgaged the purchased shares of the villages to *Sarju Parshad* to secure the payment of the Rs.9,000 and interest. The loan not having been paid, a suit was brought by *Sarju Parshad* against *Nandan Tewari*, and a decree was obtained for payment of the money and an order that the decree should be executed against the property hypothecated. At a sale by auction in execution of this decree on the 20th of August, 1874, *Sarju Parshad* became the purchaser of the property. He thereupon obtained mutation of names from the collector of the district, but the Commissioner on appeal by *Bir Bhaddar* and two other persons who were interested reversed this order, and directed that they should be recorded as the real owners of the property, the sale to *Nandan Tewari* being regarded as of an ismfarzi character only. Thereupon *Sarju Parshad* brought two suits against *Bir Bhaddar* and the two other persons to recover possession of the property by cancelment of the Commissioner's order. The record in the present suit is very imperfect, and contains only the decrees original and on appeal in one suit; but there is a written statement of *Bir Bhaddar*, and what is called a petition, which is apparently a written statement, also by him. Both are dated the 30th of July, 1880, and are substantially the same. In the petition *Bir Bhaddar* states as follows: "*Nandan Tewari* is my karinda (agent). When my property was put up for sale in the execution of *Mewa Lal's*

J. C. 1893

SARJU PARSHAD v. BIR BHADDAR SEWAK PANDAY.

decree, and 21st of November, 1871, was fixed for sale, I, with a view to purchase it, as advised by the Plaintiff himself, borrowed Rs.5000 of the Plaintiff on the day of the sale, on a bond dated 18th of November, 1871, to deposit the earnest money, and purchased the property in the name of *Nandan Tewari*. Afterwards, in order to deposit the balance of the consideration money, another bond for Rs.9000 was executed in Plaintiff's favour. As *Nandan Tewari* was a fictitious purchaser, the Plaintiff therefore got the last-mentioned document executed in his (*Nandan Tewari's*) name according to his choice. *Nandan Tewari* was never the actual purchaser. Neither he nor the Plaintiff has ever been put in possession."

The Lower Court found that *Nandan Tewari* was only a nominal purchaser, and that the real purchaser of the property was *Bir Bhaddar*, and dismissed the suit. The High Court, on appeal, being dissatisfied with the grounds of this judgment, required the Subordinate Judge to examine *Sarju Parshad* and submit his evidence to the High Court, which was done. Thereupon the High Court, in its judgment, held that *Sarju Parshad* "was necessarily aware that *Nandan Tewari* was a sham purchaser only at the auction sale of the 3rd of December, 1871, and that when he elected to sue him alone as the real and single obligor of the bond for Rs.9000, and as the actual owner and representative of the estate bought with this money, he did so with full knowledge of the true and different facts of the case, and that therefore his present action to prove that *Nandan Tewari* was the real and *bonâ fide* purchaser and proprietor must fail," and it affirmed the decree of the Court below. This judgment was given on the 10th of April, 1882.

On the 9th of January, 1885, the present suit was brought by *Sarju Parshad* against *Bir Bhaddar* and *Nandan Tewari*, seeking to recover Rs.7,518 3*a.*, balance of the Rs.9000, after deducting sums which had been realized, and Rs.4,818 0*a.* 6*p.*, interest, from *Bir Bhaddar* personally, and also against the property hypothecated in the bond. The First Court made a decree for *Sarju Parshad*, which has been reversed on appeal by the High Court.

After the judgment in the former suit, it might be difficult to hold that the deed executed by *Nandan Tewari* was a valid

hypothecation of the property, and it is not necessary to decide that question. The facts admitted by *Bir Bhaddar* and also found by the Court in the former suit between these parties are sufficient to shew that the Appellant, as the representative of *Sarju Parshad*, is entitled in equity to have it declared that the sums claimed with interest are a charge upon the property.

Their Lordships will humbly advise Her Majesty that an order be made in terms of the following minutes: Discharge the decrees of both Courts below. Declare that the sum of Rs.12,336 3*a*. 6*p*., together with interest Rs.864 9*a*., awarded by the decree of the Sub-Judge, amounting in all to the sum of Rs.13,200 12*a*. 6*p*., together with interest on the said sum of Rs.12,336 3*a*. 6*p*. at the rate of 8 annas per cent. per mensem from the date of the decree of the Sub-Judge, is well charged upon the properties named at the foot of the plaint in favour of *Sarju Parshad*. Liberty for the Appellant, as the representative of *Sarju Parshad*, to apply to the High Court for the realization of the amount due in respect of the said charge by sale of the said properties charged, in the event of the said amount not being paid within six months of the date of Her Majesty's Order made hereon. Order the Appellant to pay the costs of *Nandan Tewari* in the First Court, and the Respondents as the representatives of *Bir Bhaddar* to pay to the Appellant the costs incurred by *Sarju Parshad* in both Courts below.

The Respondents as the representatives of *Bir Bhaddar* will pay the costs of this appeal.

Solicitors for Appellant: *Oehme, Summerhays & Co.*

J. C.* 1893 Jan. 30; Feb. 25.

KUNWAR RAM LAL . . . . . PLAINTIFF;

AND

NIL KANTH AND OTHERS . . . . . DEFENDANTS.

AND THE REVIVED APPEAL.

ON APPEAL FROM THE COURT OF JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Law of Champerty—Agreement to share Subject of Litigation.

The English law of champerty is not in force in *India*, and agreements to share the subject of litigation, if recovered, are not in themselves opposed to public policy. But when such agreements are extortionate and inequitable effect should not be given to them, although compensation for legitimate expenses may properly be awarded.

APPEAL from a decree of the Judicial Commissioner (April 24, 1888) modifying a decree of the District Judge of *Sitapur* (Nov. 30, 1886), which dismissed the Appellant's suit with costs.

The facts are stated in the judgment of their Lordships.

The Appellant sued upon an agreement whereby the Respondents and one *Hira Lal* agreed with him that he should prosecute at his own expense their claim for the restoration of a zemindary, and that if the claim were successful they would sell him, in consideration of the expenses incurred by him, a nine-annas share of the property so recovered. He asserted that he had spent Rs.7550 in prosecution of their claim, which was successful; that *Hira Lal* had performed his part of the agreement, but that the Respondents refused to perform their part.

The Respondents did not deny the execution of the agreement, but pleaded that it was obtained from them by fraud and undue influence; that it was without consideration and oppressive; that there were no other claimants except themselves; and that no outlay beyond an eight-annas stamp for the application was required; that the agreement was against public policy, and that the suit was barred by limitation.

The District Judge dismissed the suit. He found that the

* *Present* :—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Appellant had not used fraud, misrepresentation, or undue influence, and that he had not taken unfair advantage of the Respondents. He proceeded :—

"Taking the statement of expenses into consideration, I am of opinion that the agreement to sell a share to Plaintiff, made by Defendants, has been made without consideration, and though the Defendants may have given their consent freely to the agreement, it must be presumed that they were led to believe that their legal expenses would be approximately an equivalent to the value of the share they agreed to transfer. In this case, I find the consideration altogether inadequate, and I cannot, therefore, find that Defendants gave their consent to such wilful waste of money as Plaintiff has expended on their behalf. I therefore find that the expenses were not legitimate, although they may have been spent in prosecuting Defendants' case. Such a contract as is before the Court must be said to be against public policy, and therefore I find it invalid, and that it cannot be specifically enforced."

The Judicial Commissioner awarded to the Appellant the sum of Rs.1000 with proportionate costs, but refused to grant him specific performance, and in other respects dismissed his suit. The Judicial Commissioner considered that the Defendants were rude and ignorant rustics, whose claim would have been admitted as soon as it was made, and was never really opposed, and that the Plaintiff, being bound to disclose to them the essential facts of the case, had misrepresented the facts to them, and endeavoured to make them think their claim was precarious and contested. He also thought that the outlay actually incurred by the Plaintiff was unnecesary and unjustifiable, and that several of the items of which it was made up could not properly be charged to the Defendants.

Mayne, for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

LORD MORRIS :—

This case comes on appeal from the Judicial Commissioner of

J. C. 1893

KUNWAR RAM LAL v. NIL KANTH.

Oudh, and the Respondents have not appeared to defend it. It is a claim by *Kunwar Ram Lal*, the predecessor of the Appellants, to have a sale deed executed and for delivery of proprietary possession of $6\frac{3}{7}$ annas share of certain villages. It appears that one *Basant* had been the grantee of and in possession of the property in question, and that on his death his widow *Mussumat Maikan* became the possessor. She died in 1882; on her death one *Hira Lal*, who was the first cousin of *Basant*, claimed the property; the first Respondent *Nil Kanth*, the father of *Mussumat Maikan*, also claimed. In October, 1882, certain persons petitioned the Government, alleging that they were old hereditary zemindars of part of the property and praying to be restored to the possession of it. That petition was rejected on the 8th of December, 1882, and possession was given by the Government to *Nil Kanth* and *Hira Lal*, who had agreed to divide the property in the proportion of $4\frac{4}{7}$ annas to *Hira Lal* and the remaining $11\frac{3}{7}$ annas to *Nil Kanth* and other relatives of *Mussumat Maikan*. The Plaintiff in this suit sought to enforce against *Nil Kanth* and other relatives of *Mussumat Maikan* an agreement dated the 3rd of November, 1882, *Hira Lal*, one of the parties to the agreement, not being made a Defendant to the suit on the ground that he was alleged to have performed his part of the agreement. The agreement provided that, in consideration of the Plaintiff having taken upon himself the liability to pay all expenses of the prosecution of the suit of the Defendants and *Hira Lal* to get possession of the property, they agreed with him that as soon as they were put in possession they would sell to him nine-annas share of the property, in lieu of and in consideration of the expenses to be incurred by the Plaintiff in the prosecution of the case. This agreement was signed by the Defendants and *Hira Lal*.

The District Judge dismissed the Plaintiff's claim, on the ground that the agreement was unfair, that the Defendants were misled into the belief that the expenses would be approximately equivalent to the value of the share agreed to be transferred, and consequently that it would be against public policy to enforce it. The Judicial Commissioner, on appeal, arrived at the same conclusion, but under the prayer for general relief in the petition of

plaint he awarded the Plaintiff Rs.1000 as compensation for any expenses legitimately incurred by him.

The English law of champerty is not in force in *India*, and documents which set up agreements to share the subject of litigation if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy; but such documents should be jealously scanned, and, when found to be extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them. The Plaintiff in this suit was a money-lender, and was dealing with illiterate persons; he must have represented to them the likelihood and the necessity of extensive litigation—a representation unwarranted by the facts; further, the fee paid to the vakil, *Bansi Lal*, was most excessive, and disproportionate to any work likely to be done by him.

No evidence was given that the assertion made in the agreement of the 3rd of November, to the effect that to recover possession for the Defendants would require large sums of money, was true, or that the Plaintiff had any ground for believing it to be true. In fact, the proceedings were brief and simple. The widow died on the 27th of September, 1882; the zemindars' claims were rejected on the 8th of December; the controversy between the widow's heirs and her husband's was settled by agreement before the 3rd of November, and the parties were put into possession in December. In such circumstances their Lordships concur with the view of the transaction taken by the District Judge and the Judicial Commissioner. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed.

Solicitor for the Appellants: *Young, Jackson, & Beard.*

J. C.* BALGOBIND DAS . . . . . PLAINTIFF;

1893

AND

March 10, 14; *April* 28. NARAIN LAL AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Mitakshara—Coparcener cannot mortgage his Share—Remedies of Mortgagor of Undivided Share.

It is the settled law of the Mitakshara, as administered in *Bengal* and the North-West Provinces, that a Hindu cannot, without the consent of his coparceners, sell or mortgage his undivided share in the ancestral estate for his own benefit.

Where a son had mortgaged his half-share, and his father had *bonâ fide* without notice of the mortgage purchased portions of the mortgaged property at sales in execution of decrees against the son, *held* that the son's coparcenary interest therein passed to the purchaser, and that the only remedy of the mortgagee was to attach and sell any unsold portion of the mortgaged property in execution of a money decree against the mortgagor.

APPEAL from a decree of the High Court (Feb. 13, 1889), affirming a decree of the Subordinate Judge of *Benares* (Feb. 4, 1887).

The Appellant, a banker of *Benares*, lent moneys to the first Respondent, *Narain Lal*, who is the son of the third Respondent, *Naunidh Lal*. On the 27th of November, 1879, Rs.93,000 were due by *Narain Lal*, who executed a bond covenanting to repay that sum with interest, and mortgaging to the Appellant his four-annas share of certain property in which he and his father were entitled to an eight-annas share as a joint and undivided Hindu family consisting of father and son and governed by the Mitakshara law.

On the 12th of February, 1886, the Appellant sued to recover the amount due on the bond "by enforcement of the hypothecation lien and sale of the mortgaged and hypothecated property," and also by rendering *Narain Lal's* person and other property liable. To this suit he made *Balkishen Lal* and *Bhola Singh* parties, charging that they had bought, at certain execution sales

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

held after the date of the mortgage bond, *Narain Lal's* right, title, and interest in portion of the mortgaged property. *Bhola Singh* and *Balkishen Lal* filed their written statements pleading that *Narain Lal*, as one member of a joint Hindu family, under the Mitakshara law was not entitled to mortgage his undivided share in the joint family property as he had done, and in consequence of such plea the Appellant obtained an order to have *Naunidh Lal*, the father of *Narain Lal*, added as a party Defendant.

Naunidh Lal pleaded that he and his son were members of a joint Hindu family subject to the Mitakshara law, and were each entitled to a half-share of their joint property; that he and his said son were joint in "business, property, residence, and food," and that "no separation, specification, or partition" of property had taken place between them, nor had the "right or share" of *Narain Lal* as yet been ascertained, and that under these circumstances *Narain Lal* was not competent to execute the mortgage deed, which he charged to be invalid and illegal.

The Subordinate Judge found that the mortgage deed was duly executed and the money to be due. But he found that as to twelve of the mortgaged properties, *Narain Lal's* interest had been seized and sold in execution, and had been bought at such sales by *Naunidh Lal* before the date of the mortgage deed, which could not therefore affect them. With regard to the Appellant's contention that the sale of the son's share in certain of the joint properties in execution of decrees against him and the purchase of such share by his father had altered the character of the son's interest so as to take from such property the character of joint family estate as understood in Mitakshara law, the Subordinate Judge, after referring to decided cases, held that such sale and purchase did not change the character of the remainder of the joint family estate so as to render the coparceners separate proprietors of separate shares therein. He also held that the purchases by *Balkishen Lal* and *Bhola Singh* of *Narain Lal's* interest at execution sales did not estop them from disputing his right to mortgage the said share before such sales to them.

In appeal the High Court said: "We have come to the conclusion that *Narain Lal* had no power to effect this mortgage affecting the property of a joint Hindu family."

J. C. 1893 BALGOBIND DAS v. NARAIN LAL

Cowie, Q.C., and *Branson*, for the Appellant, contended that *Narain Lal's* mortgage, under the circumstances of the case, effected a good and valid charge upon the properties included therein. With regard to the power of a coparcener under Mitakshara law to aliene his share, that has been uniformly denied both in *Bengal* and the North-Western Provinces. [Reference was made to *Appovier's Case* (1) and to *Sadabart Prasad Sahu* v. *Foolbash Koer* (2).] No doubt the doctrine laid down in those cases is the logical result of a coparcener not being entitled to a specific share till partition, and of his being merely entitled till that event to an unascertained and variable interest in the family estate, and also of the rights of other coparceners by survivorship. But, on the other hand, each coparcener, even the son against his father, has a vested right to a partition, that is, to insist upon his share being ascertained, and thenceforth vesting in himself individually. The mortgage by the son in this case, at least, operated on all his equitable rights in the property so far as they were ascertainable by his own act. [Reference was made to *Ganraj Dubey* v. *Sheozore Singh* (3); *Chamaili Kuar* v. *Ramprasad* (4); *Ramanand Singh* v. *Gobind Singh* (5); *Madho Parshad* v. *Mehrban Singh* (6).] He may transfer his right to call for a partition. [Reference was made to *Suraj Bunsi Koer* v. *Sheo Prosad Singh* (7); *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Roy* (8); *Deendyal Lal* v. *Jugdeep Narain Singh* (9).] Since 1869 the decision in 3rd Beng. L. R. has never received the final sanction of the Board. The case of *Mahabeer Persad* v. *Ramyad Singh* (10) shews that the equities as between alienor and alienee may be dealt with in such a way as to bring about a result not practically different from that of a valid alienation. There is no real and vital distinction between the position of a purchaser at an execution sale and a purchaser or mortgagee under a voluntary alienation. It is not desirable to perpetuate this distinction between the law of the Mitakshara as

(1) 11 Moore's Ind. Ap Ca. 75.
(2) 3 Beng. L R F. B 31.
(3) Ind. L. R. 2 Allah. 898.
(4) Ind. L. R. 2 Allah. 267.
(5) Ind. L. R. 5 Allah. 384.
(6) Law Rep. 17 Ind. Ap. 194.
(7) Law Rep. 6 Ind. Ap. 88.
(8) Law Rep. 3 Ind. Ap. 7.
(9) Law Rep. 4 Ind. Ap. 247.
(10) 12 Beng. L. R. 90.

administered in *Bengal* and the North-West and as administered in the rest of *India*. A charge has been created on the undivided share which gives the mortgagee a right to exercise all the remedies which the mortgagor possessed at the date of the mortgage. The Appellant has an equity to enforce such charge within the meaning of *Madho Parshad* v. *Mehrban Singh* (1). As the share to which a coparcener is entitled before partition is variable, reference was made to *Rangasami* v. *Krishnayyan* (2), to shew that the mortgage applies to the share to which the mortgagor was entitled on partition, if it took place at the date of suit.

Mayne, for the Respondent *Naunidh Lal*, contended that under the Mitakshara law as administered in *Allahabad* the mortgage sued on was ineffectual. There is a long course of decisions not merely in *Bengal*, but also in the North-West, that a coparcener cannot aliene his share. In fact, in the North-West there are no decisions to the contrary; those of the old Sudder Court were all to the same effect. The share only became alienable when a right to seize and sell in execution an interest of the indefinite nature possessed by a coparcener was first recognised by statute. [SIR R. COUCH:—Was there in the old Regulations a power to seize and sell right, title, and interest of a coparcener? From Act VIII. of 1859 that power existed, and could not be affected by its being inconsistent with the old family law.] Possibly it was introduced into Act VIII. from some earlier Regulation; at all events, that Act gave power to seize and sell a coparcenary interest. But that did not extend the power of voluntary alienation which in *Bengal* and the North-West has always been denied. The Appellant, therefore, has to establish that the mortgaged estate had been withdrawn from the rule of coparcenary. *Sadabart Prasad Sahu* v. *Foolbash Koer* (3) fully states the doctrine. It does not purport to rest on old Hindu authority, but on a series of earlier decisions. It has been followed by decisions down to *Chunder Coomar* v. *Hurbans Sahai* (4). As

(1) Law Rep. 17 Ind. Ap. 198.
(2) Ind. L. R. 14 Mad. 408.
(3) 2 Beng. L. R. F. B. 31.
(4) Ind. L. R. 16 Calc. 137.

J. C. 1893 BALGOBIND DAS v. NARAIN LAL

regards *Allahabad* decisions, see *Chamaili Kuar* v. *Ramprasad* (1); *Ramanand Singh* v. *Gobind Singh* (2). [LORD WATSON :— That case goes further than 3 Beng. L. R. R. F. B. 31.] *Vasudev Bhat* v. *Venkatesh Sanbhav* (3); *Bhugwandeen Doobey* v. *Myna Baee* (4). And *Madho Parshad* v. *Mehrban Singh* (5) decides that if a coparcener dies after alienation the rights of the survivors are paramount to those of the purchaser. Reference was also made to *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (6), which refuses to extend the power of a coparcener. It was contended that a mortgage by a coparcener does not create an immediate vested interest in any fraction ascertained or unascertained of the family property. It is merely a personal contract between the mortgagee and the undivided coparcener which attaches if and when the coparcenary interest is partitioned and ascertained. Any purchaser can sue for a partition, and then the charge attaches. Until then there is no charge, the coparcenary proceeds as before, the rights of survivorship remain; the other coparceners are wholly unaffected by the so-called alienation. All that has passed is an equitable right to the mortgagee to pursue his remedy by partition, and until he does so no charge or proprietary right is created. Reference was made to Sir *T. Strange's* Hindu law, vol. i. p. 202. [SIR R. COUCH referred to *Udaram Sitaram* v. *Ranu Panderji* (7).] See *Vasudev Bhat* v. *Venkatesh Sanbhav* (8). To allow the contention of the Appellant would be an enormous extension of the power of a coparcener. In this case many of the purchases made by the Defendants were made prior to the date of the mortgage. The later purchases were made without notice or knowledge of the mortgage. It was submitted that a transaction all along ineffective and invalid by the Hindu law should not be held effective so as to destroy all intervening rights.

Cowie, Q.C., replied.

(1) Ind. L. R. 2 Allah. 272.
(2) Ind. L. R. 5 Allah. 384.
(3) 10 Bomb. H. C. R. 139.
(4) 11 Moore's Ind. Ap. Ca. 487, 516.
(5) Law Rep. 17 Ind. Ap. 198.
(6) Law Rep. 7 Ind. Ap. 195.
(7) 11 Bomb. H. C. R. 76.
(8) 10 Bomb. H. C. R. 139.

1893. April 28. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Respondent *Narain Lal* is the son of the Respondent *Naunidh Lal*, and they are governed by the law of the Mitakshara as administered in the North-Western Provinces. On the 27th of November, 1879, *Narain Lal* executed what is known in *India* as a simple mortgage, whereby, in consideration of a debt of Rs.86,834 12*a*. 3*p*. then due to *Balgobind Das*, the Appellant, and a further advance of Rs.6165 3*a*. 9*p*., making together Rs.93,000, *Narain Lal* pledged a 4-anna share owned by him under the Hindu law out of the 8-anna share of his father *Naunidh Lal* in the ancestral property situate in the districts of *Benares*, &c., of which a detail was given at the end of the deed. And he bound himself to pay the principal sum and interest at Rs.1 8*a*. per cent. per mensem within two years from the date of the bond. Neither the principal sum nor any part of the interest was paid within the two years nor subsequently; but the Appellant did not take any steps to enforce the bond until the 12th of February, 1886, when he brought a suit in the Court of the Subordinate Judge of *Benares* to recover the principal money and interest by enforcement of the hypothecation lien and sale of the mortgaged property. The Defendants in the suit were *Narain Lal* and two others, *Balkishen Lal* and *Gopal Das*, who were joined as being in possession of portions of the mortgaged property. By an order dated the 22nd of June, 1886, *Bhola Singh* was made a defendant instead of *Gopal Das*, and by another order dated the 22nd of September, 1886, *Naunidh Lal* was made a defendant. The real contest in the suit was between him and the Appellant. The defence set up in his written statement is that he and his son were under the law of the Mitakshara, and that the mortgage deed was invalid; that out of the properties mentioned in the plaint the properties in the first schedule to the written statement were sold to the extent of the rights and interests of *Narain Lal* in execution of decrees held by third parties before the date of the Plaintiff's mortgage bond sued on and were purchased by him with his own money in the name of

J. C. 1893 BALGOBIND DAS v. NARAIN LAL.

his wife; that the rights of *Narain Lal* in the properties mentioned in the second schedule were purchased in good faith by him with his own money, some in his own name, some in the name of his wife, and some through his mokhtar. The whole of the purchases were made at sales by auction in execution of decrees, and it was found by the first Court that the Defendants were *bonâ fide* purchasers who had no notice or knowledge of the mortgage to the Plaintiff. It was admitted by the learned counsel for the Appellant that there was no fact in dispute in this appeal. There is no question as to the properties in the first schedule. They are clearly not affected by the mortgage deed. As to the properties in the second schedule, the purchasers, according to the judgment of this Board in *Deendyal Lal* v. *Jugdeep Narain Singh* (1), acquired the right of compelling the partition which the debtor might have compelled had he been so minded before the alienation by the sale of his share took place. The main question in the case is whether the mortgage is valid, and creates a charge which is to have priority over purchases at execution sales made *bonâ fide* and without notice of it.

The Subordinate Judge held that *Narain Lal* was not competent to mortgage his undivided share in the joint estate without the consent of his father for a debt incurred for his own individual benefit, and made a decree that the Plaintiff should recover Rs.1,26,480 out of the amount claimed from *Narain Lal* personally, dismissing the rest of the suit. The High Court, on appeal, affirmed this decree with a variation of the interest.

As to the defence that the mortgage deed is invalid, the leading case upon the Mitakshara law as administered in *Bengal* and the North-Western Provinces is *Sadabart Prasad Sahu* v. *Foolbash Koer* (2). In that case two questions had been referred to a Full Bench, the second being "*Bhagwan Lal* (a member of a Hindu family governed by the Mitakshara law) in his lifetime executed an ordinary zur-peshgi mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of *Bhagwan Lal* (who had died) recover from the mortgagee, without redeeming the same, pos-

(1) Law Rep. 4 Ind. Ap. 247. (2) 3 Beng. L. R. F. B. 31.

session of the mortgaged share, or any portion of it?" Sir *Barnes Peacock*, in delivering the judgment of the Full Bench (the other Judges concurring) upon this question observed that there were conflicting decisions on the subject, cases in the reports of the High Courts of *Bombay* and *Madras* being in the affirmative, and a case in the High Court at *Calcutta* in the negative, and said that the decision of the *Calcutta* High Court was founded upon a current of authorities supported by the Vyavasthas of Pandits which it was too late for the Courts to overrule even if they were disinclined to agree in the principle established by them. Then, after referring to reported decisions of the Sudder Courts, the earliest of which in *Bengal* was in 1822, and in the North-Western Provinces (formerly part of *Bengal*) was in 1860, and to the parts of the Mitakshara bearing upon the question, he concluded by saying: "Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon. I am of opinion that upon the simple fact stated in the second question, *Bhagwan Lal* had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family."

In the judgment in *Deendyal's* case the distinction between a voluntary alienation and a sale in execution is referred to thus: "Their Lordships finding that the question of the rights of an execution creditor, and of a purchaser at an execution sale, was expressly left open by the decision in *Sadabart's* case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in *Bengal* as that which exists in *Madras*. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's* case as to voluntary alienations. But however nice the distinction between the

J. C. 1893 BALGOBIND DAS v. NARAIN LAL

rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them." It appears to have been sometimes suggested that the law in *Madras* and *Bombay* is a logical consequence of the decision in *Deendyal's* case, and some argument of this kind seems to have been urged in the present case before the Subordinate Judge. Upon this there is an important passage in the judgment of this Committee in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1), where the question related to an alienation by will upon which the authorities in *Bombay* and *Madras* were then in conflict. At page 193 their Lordships say: "The argument (that the will should be treated as a disposition by the co-sharer in his life-time of the undivided share) is founded upon the comparatively modern decisions of the Courts of *Madras* and *Bombay* which have been recognised by this Committee as establishing that one of several coparceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers"; and at p. 195: "Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* above referred to they observed: 'There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law); and the law as established in *Madras* and *Bombay* has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition.' The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are limits of an exceptional doctrine established by modern jurisprudence."

The reported decisions as to the law in the North-Western Provinces do not go so far back as those in *Bengal*, but in *Chamaili Kuar* v. *Ramprasad* (2), Mr. Justice *Oldfield* says: "The question cannot be said to be at this time an open one on

(1) Law Rep. 7 Ind. Ap. 181. (2) Ind. L. R. 2 Allah. 267.

this side of *India*. There is no doubt a current of decisions by this Court, invalidating sales by one coparcener without the consent express or implied of his coparcener, and I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest. . . . The law may be said to have been settled by a course of decisions, and it would be undesirable to disturb it."

The reason which has led to the recognition by this Committee of the law in *Madras* and *Bombay* applies as strongly to the recognition of the settled law of *Bengal* and the North-Western Provinces, and the judgment in the 7th Indian Appeals appears to their Lordships to be a recognition of that law. This is confirmed by the judgment of this Committee in *Madho Parshad* v. *Mehrban Singh* (1). There a Hindu, without the consent of his coparcener, had sold his undivided share in the family estate for his own benefit, and received the purchase-money to his own use; on his death the surviving coparcener sued to recover the share. In the judgment delivered by Lord *Watson* it is said that the counsel for the appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of *Bengal* are applicable in *Oudh* to the alienation of interests in a joint family estate; and that he likewise conceded that the sales being without the consent of the coparcener, and not justified by legal necessity, were, according to that law, invalid; but he maintained that the transactions being real, and the prices actually paid, the respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase-moneys. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold, except on condition of its being made at once available for the repayment of the price which he received, but that the respondent who took by survivorship was not affected by any equity of that kind, and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving coparcener except by repealing the rule of the Mitakshara law. In the present case the interest

(1) Law Rep. 17 Ind. Ap. 194.

J. C. 1893

BALGOBIND DAS v. NARAIN LAL

has passed to *Naunidh*, not by survivorship, but by purchases at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of the mortgage deed. If any portion of *Narain Lal's* share is still unsold, the Appellant may attach and sell it in execution of the decree against *Narain Lal* personally, but not by virtue of the mortgage. The decision in this suit is not intended to prejudice that right. But for the above reasons their Lordships hold that the suit against the other Defendants was rightly dismissed. The High Court altered the decree of the Subordinate Judge by giving to the Appellant interest on the Rs.93,000 at 5 per cent. per annum from the 27th of November, 1881, to the 13th of February, 1889, the date of its decree. In the mortgage deed it is covenanted that even if a suit is instituted, interest shall be paid on the whole or part of the principal amount at the rate of Rs.1 8*a.* per cent. per mensem (18 per cent. per annum), and the decree should be varied by giving interest at that rate instead of 5 per cent. to the 12th of February, 1886, the date of the institution of the suit.

Their Lordships will humbly advise Her Majesty accordingly. The Appellant, having substantially failed, will pay to the Respondent *Naunidh Lal* his costs of this appeal.

Solicitor for Appellant: *J. F. Watkins.*

Solicitors for Respondent *Naunidh Lal: Pyke & Parrott.*

RAJAH MOKHAM SINGH AND OTHERS . . PLAINTIFFS; J. C.*
1893
AND
RAJAH RUP SINGH . . . . . DEFENDANT. *March* 17; *April* 28.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Law of Champerty—Advances made for the Purpose of Appeal—Unconscionable Bargain.

Where the Plaintiffs had, in the belief that the Defendant's claim to an estate was well founded, advanced the funds necessary to enable him to prosecute a successful appeal to the Privy Council, and the High Court held that the reward stipulated for was in the circumstances excessive and unconscionable, and gave a decree for the amount of moneys actually advanced with interest thereon:—

Held, that such a decree would not be reversed unless shewn to be clearly wrong.

Ramcoomar Coondoo v. *Chunder Canto Mookerjee* (Law Rep. 4 Ind. Ap. 47), followed.

APPEAL from a decree of the High Court (July 12, 1888), modifying a decree of the Subordinate Judge of *Mainpuri* (April 24, 1886), which dismissed the Appellants' suit.

The suit was brought to enforce an admitted agreement dated the 13th of March, 1882 (set out in their Lordships' judgment), and to obtain possession of a one-eighth share of the villages scheduled thereto, and constituting the *Bhara* estate, and to recover a similar share of Rs.64,155, being a debt due to that estate with interest.

The principal question in the appeal was as to whether under the law of *India* relating to champerty agreements the Appellants were entitled to enforce this agreement.

The facts are stated in the judgment of their Lordships.

The grounds on which the First Court entirely dismissed the suit are as follows:—

"The principle adopted by the Courts appears to be that when such a transaction is opposed to justice and equity it will not be enforceable, and I am not prepared to say that this transaction

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

J. C. 1893 RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

has been effected by the Plaintiffs either in consonance with justice and equity or in good faith. It is true that, being poor, the Defendant stood at the time in very urgent need of money for preferring his appeal to the Privy Council, and shewed his readiness to, and did, make conditions as the Plaintiffs wished. But the Plaintiffs should have surely seen whether what they obtained in writing was such as would be held by the Courts to have been so obtained in a proper and *bonâ fide* way or having regard to the wants of the Defendant in an unjust and inequitable way. Now, let us turn to the points which give rise to reasonable presumptions against the justice of the document. It was agreed that Rs.12,500 in all should be paid by the Plaintiffs, and as to this amount also the Court cannot at present say whether they have even now spent the whole amount thereof. In lieu of that amount it was agreed that Rs.8000 of debt in cash should be assigned and a one-eighth share of the entire *Bhara* estate should be given. The revenue of the estate is Rs.34,463 8*a.*, and an eighth part thereof is Rs.4000, and something more. If the profits thereof be held to be nearly equal to the revenue and fifty per thousand be held to be the profits, the value of the property, according to the usage of this country comes to more than Rs.80,000, and the entire property purchased amounts in value to about a lakh of rupees. Thus there can be, in fact, no justice which may hold this sale to be equitable and just. The Plaintiffs themselves have claimed mesne profits for one year amounting to Rs.3540, which is an amount equal to the revenue nearly. In the second place, the second condition of the document should also be seen. It shews that the Plaintiffs' intention, by all means, was to get the estate by any means whatever, *i.e.*, if the Defendant might enter into a compromise and get the appeal struck off, the Plaintiffs themselves might become Appellants and party to the case, and thus attain success. It appears that, from the very beginning of the transaction, the Plaintiffs intended to get the estate, and that they did not advance the money to help or assist the Defendant. I do not therefore think it just to render any assistance to persons possessed of such bad faith. It is quite true that had the Plaintiffs not helped the Defendant he would perhaps have encountered

the greatest difficulty in preferring his appeal to the Privy Council. But, along with this, it should also be considered that it is improper that the Plaintiffs, having helped him to wade out of the difficulties, should now themselves ruin him. As the men who had helped the Defendant and made him a Rajah, they should have asked him for the amount due to them, or at most something more on account of damages in the shape of interest, and thus have laid him under obligation. In this way it would be said that the Defendant was made a Rajah by the Plaintiffs, and the latter would have received their money and gone home. It was by no means becoming of the Plaintiffs, who had made him a Rajah, to have now joined together in bringing him down from the dignity of a Rajah to the state of a subject, and themselves becoming the Rajahs at his expense. In my opinion, apart from the consideration of faith, the very Privy Council decision which forms the groundwork of this case is a ruling shewing the impropriety of this claim: *Rajah Rup Singh* v. *Rani Baisni and the Collector* (1). A substance of the ruling of our Lords of the Privy Council is, that though this estate may not possess sovereign rights, yet it is an old and ancestral Raj, and therefore impartible; that, following the long family usage, it shall not be given to a woman; and that, as a single male person remains in possession of it, the Defendant, uncle of the deceased Rajah, shall get it. In short, this judgment is replete with such remarks as shew that it should neither be partitioned nor received by a woman, nor shared in by any person, and that there should remain only one male person as the Rajah, who should be the sole master thereof. Thus, if the Plaintiffs' claim were to be decreed now, it would necessitate a partition of the eighth part of the estate to be awarded to them, who might be called Rajahs or Maharajahs thereof. But this would be altogether against the intent of the Privy Council ruling, and it would be, as if it were, cancelling the said ruling. To decree this claim would, in fact, be to set aside the Privy Council judgment. Thus, I think, that even if the claim were to be good as based on the Privy Council decision, it is now improper."

The High Court, on the contrary, held that the Appellants

(1) Law Rep. 11 Ind. Ap. 149.

J. C. 1893 RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

were entitled to recover the amount of their advances with interest, and also compensation for their having become security for the Defendant's costs; but they concurred in dismissing the remainder of the claim. Their view of the case was as follows:—

"We find that the Defendant perfectly well understood the nature and effect of the deed of the 13th of March, 1882. We also find that his agents, who negotiated that transaction, acted *bonâ fide*, and to the best of their powers, in the interest of the Defendant, placed as he was in a position of great difficulty at the time. Of anything like actual fraud or of any deception on the part of the Plaintiffs or the Defendants' agent, we find there was none. It has been contended on the part of the Defendant that, having regard to the judgments of their Lordships of the Privy Council in the case of *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Sing* (1), we cannot give any relief whatsoever to the Plaintiffs here. That case was one essentially different from the case before us. In that case the assignee or vendee was not the person seeking to enforce the contract. The person there who was seeking to enforce the contract was a person who had purchased the contract from the original vendee for a comparatively small sum. It was plain in that case that, if the plaintiff failed to enforce the contract he had purchased, he was not in a position to fall back on and ask for the consideration his assignor had given. That was not the right which he had purchased. There is the other distinction between that case and this—that here the Plaintiffs performed all that they undertook to perform, whereas in the case of *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Sing* (1), the original vendee had not, nor had the assignee, performed the vendor's part of the contract. There were two other cases referred to which, in the view we take of the case, we need not consider. On behalf of the Defendant, it was also contended that this was a gambling transaction, that the bargain was unconscionable, and that to enforce the contract would be against public policy. In this case, undoubtedly, the Defendant was in a position of very great distress: his suit had been dismissed in the Court of the Subordinate Judge; his appeal from the decree of the Subordinate Judge had been dismissed by this Court; he was without

(1) 12 Moore's Ind. Ap. Ca. 310.

any means; and unless he obtained assistance on such security as he could offer, he could not have filed or prosecuted his appeal to the Privy Council. So far as we have been able to ascertain, he had not even the means of subsistence. That he had a good case was proved by his success in the appeal to the Privy Council. That people generally considered that his case was a bad one may be inferred from the difficulty he met with in procuring the means to appeal to the Privy Council. At that time he had the decrees of the two Courts against him. The Plaintiffs in this case did not seek the Defendant. They did not press the Defendant to accept the terms contained in the deed of the 13th of March, 1882. It was the Defendant and his agent who put pressure on the Plaintiffs to advance the money on the terms contained in that deed. Some of the Plaintiffs are not money-lenders by profession. Two of them are independent gentlemen, who were residing on their own estates. That the Defendant, even after he had obtained his decree in the Privy Council, never thought there was anything unconscionable in the transaction, may be inferred from the fact that it was he who proposed that the Plaintiffs, instead of taking the shares in the villages assigned by the deed of the 13th of March, 1882, should take a sum of Rs.50,000. At that time, apparently, this Defendant Rajah, thankful for the assistance which had been rendered to him—an assistance which placed him in the position of a wealthy man, and relieved him from the position of being a man without the means of subsistence—honestly intended to perform his contract and discharge the debt which he had incurred. It was not until after that time that this gentleman thought it advisable, having obtained all the benefit which he needed from the use of the Plaintiffs' money, to invoke the assistance of the law to enable him to avoid the performance of a contract which the Plaintiffs, believing in his honour, had treated as a valid contract on which they had advanced their money and incurred liability. There is, in our judgment, a very wide difference between this case and many other cases in which persons interfere in litigations not their own for their own benefit. If the Plaintiffs here had been professional mokhtars, vakils, or persons of that class, or if they had been professional money-lenders, who had taken

J. C. 1893 RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

advantage of the position of the Defendant to obtain from him a contract of this kind, we should without hesitation have given them no relief whatever. But they are not persons of that class; they had not volunteered their assistance to promote the litigation; they had given reluctantly this assistance to help a neighbour in a case which was apparently almost hopeless at the time. They trusted in the honour of the Rajah as a native gentleman. He had no security to offer, except what appeared to be the off-chance of his succeeding in a case in which he had been twice defeated. We confess that in this case our sympathies are entirely with the Plaintiffs, and we do not refuse to decree their claim for possession of the share out of any sympathy for the Defendant. The fact that the borrower had fruitlessly sought assistance from other persons who refused the bargain on the ground that it was not advantageous, has been held by the Courts in *England* to be merely proof of the distress of the borrower, and not evidence that the bargain was a fair one and not an unconscionable one. In this case, judging by the disproportion between the liability which the Plaintiffs incurred under the contract and the amount of the reward which they were to obtain in the event of the Defendant succeeding in the Privy Council, we are compelled to conclude either that the Plaintiffs did not believe that the Defendant's claim in the action was well founded and consequently entered, although unwillingly, into a gambling transaction, or that if they did believe that his claim was well founded, then the reward which, under their contract, they were to obtain, was excessive and unconscionable. In either event, we could not enforce this contract in its terms. As was said by Sir *William Grant* in the case of *Bowes* v. *Heaps* (1): 'It is not, however, every bargain which distress may induce one man to offer that another is at liberty to accept.' It is true that Sir *William Grant* was dealing in that case with a reversioner or remainderman; but we are told by their Lordships of the Privy Council that the doctrine of equity which applies in those cases is to be applied in *India*, and apparently in cases in which it would not be applicable in *England*. If we are to apply that doctrine of equity in favour of the borrower, we

(1) 3 V. & B. 117.

should also apply the doctrine of equity in such case in favour of the lender. It is contended in this case on behalf of the Defendant that we should not even give a pice to the Plaintiffs who had advanced their money and deposited their security bond in this Court. As we have said, if this was a case in which we had reason to suspect the motive of the lenders, we would without hesitation leave them without any remedy so far as we are concerned. But this is a totally different case, and we think it would be inequitable on our part if we were to relieve the Defendant from all liability to the Plaintiffs. On the 31st of January, 1881, the Plaintiffs deposited in this Court their security bond for Rs.4000 as security for costs to be incurred in the Privy Council. Their Lordships of the Privy Council gave judgment in the appeal in March or April, 1884, in favour of the Defendant. On the 21st of April, 1884, the Registrar of the Privy Council gave notice of the decree under the seal of the Council. Allowing for the course of the post, the Plaintiffs at the earliest could not have obtained their bonds from this Court before the 21st of May, 1884. We think that it is only fair between these parties that the Defendant should be obliged to compensate the Plaintiffs for the use of their bonds during that time, that is to say, from the 31st of January, 1881, until the 21st of May, 1884. We think that a most reasonable compensation to be paid by the Defendant to the Plaintiffs for the use of their bonds for that time is simple interest at 12 per cent. per annum on the amount of those bonds for that period. The Plaintiffs advanced Rs.783 for expenses of translation and printing of documents in this Court. Of that sum Rs.691 was actually paid into this Court by the 10th of May, 1881, and from that date we allow interest on that sum, until the date of our decree, at 20 per cent. per annum. Rs.92 of the Rs.783 were paid by the 22nd of September, 1882—the precise date we cannot ascertain; but this is the date on which the papers were forwarded to the Privy Council, and similar interest is allowed on the Rs.92 from the 22nd September, 1882, until the date of our decree. Then comes the item of Rs.4759: that money was advanced—a great portion of it—in the early months of 1883, and the whole of it by the 1st of August, 1883. We take that

J. C.
1893
RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

as a lump sum, and we take the date of the 1st of August, 1883 —a date rather in favour of the Defendant as a starting point for interest—and we allow on that sum of Rs.4759 similar interest to the date of our decree from the 1st of August, 1883. There only remains a sum of Rs.2000: this was a sum which was advanced by those parties for the purpose of the review. Unfortunately *Pandit Nand Lal*, a well-known pleader of this Court, who might have given us precise information on that point, is not now alive; but we know from the evidence that a sum of Rs.2000 was advanced for the purpose of the review, which was applied for in the Privy Council, and we conclude that it must have been advanced before the 29th of November, 1884, as on that date their Lordships of the Privy Council rejected the application for review. We allow similar interest on that Rs.2000 from the 29th of November, 1884, to the date of our decree, and we decree that the Defendant do pay to the Plaintiffs the several sums mentioned by us, together with interest from the dates which we have mentioned. We do not include in the amount decreed the amounts for which the bonds were given. We also decree the costs of this litigation to be paid by the Defendant to the Plaintiffs; and further decree that the amount above indicated, which we may call debt and costs, will bear interest at 6 per cent. from the date of decree."

Doyne, and *Ross*, for the Appellants, contended that there was nothing inequitable or unconscionable in the agreement having regard to the circumstances in which it was made. It was freely entered into by the Respondent. The Appellants incurred great risk of a complete loss of their advances. The Respondent has in the result benefited enormously. So far from thinking that he had been inequitably treated, he expressed, since the successful issue of the appeal, his willingness to carry out the agreement, thereby approving its terms after the pressure of circumstances had been removed. It was not till a question had arisen whether the Appellants should recover in land or money that their claim was opposed. At first the Respondent offered Rs.50,000, but afterwards refused to pay anything. The Appellants, to obviate any difficulty arising from the impartible

character of the estate, offered in the Courts below to take their one-eighth share in money; and the estate was accordingly valued on reference to the Collector at Rs.400,000. Upon the question of aliening a share in an impartible estate, reference was made to *Rani Sartaj Kuari* v. *Rani Desraj Kuari* (1), *Uddoy Aditya Deb* v. *Jadublal Aditya Deb* (2). See also as to the reasonable construction of the contract: *Gungar Parshad Sahu* v. *Maharani Bibi* (3); *Ramcoomar Coondoo* v. *Chunder Canto Mookerjee* (4); *Fisher* v. *Kamala Naicker* (5).

1893
April 28.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Respondent is the younger and only brother of *Mohendra Singh*, Rais of the ancient impartible estate of *Bhara* or *Bhauri*, who died in September, 1871, without leaving a son, but leaving a widow, Rani *Baisni*, who took possession of and held her husband's estate under an alleged title as widow. The Respondent instituted a suit against her in the Court of the Subordinate Judge of *Mainpuri* to recover possession of the estate as impartible and descending to him under the ancient usage of the family, contending that after the decease of a Rajah of *Bhara* his nearest and eldest male heir succeeds him to the exclusion of the other male heirs and the total exclusion of women. The suit was dismissed by the First Court on the 25th of September, 1878, and the Respondent's appeal to the High Court at *Allahabad* was dismissed on the 7th of May, 1880.

On the 13th of March, 1882, an instrument of sale upon which the question in this appeal arises was executed by the Respondent. It recites the institution of the suit against the widow, its dismissal, and the dismissal of the appeal, and proceeds as follows:—

"Thus arose the necessity for filing an appeal to the Privy Council. It is clear I have not a pice, and my only hope for justice lies in an appeal to the Privy Council. I have therefore

(1) Law Rep. 15 Ind. Ap. 97.
(2) Ind. L. R. 5 Calc. 113.
(3) Law Rep. 12 Ind. Ap. 47.
(4) Law Rep. 4 Ind. Ap. 23.
(5) 8 Moore's Ind. Ap. Ca. 187.

J. C.
1893
RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

with entreaties got Rajah *Loke Indar Singh* (since deceased, and now represented by the Appellant, Rajah *Mohkam Singh*), *Sheikh Nasrat Hussain* (*Lala Bhikhari Das*, *Munshi Har Narain*), *Bibi Chunni Kuar*, and *Kuar Dharam Singh*, persons belonging to the first class given below, to consent that they should meet the costs of the Privy Council, including security, by way of a help to me, and should in lieu thereof be the proprietor of an eighth share of the property involved in the case with the exception of those articles. They have accepted the proposal, and deposited the security and the translation fees, and have undertaken to pay the other expenses of the Privy Council appeal."

The Respondent then by the deed sold an eighth share in the *Bhara* estate and of outstanding debts due to the estate, amounting to Rs.64,155, to the persons before named; and it is stated that the consideration for the sale was Rs.12,500, the estimated cost of the Privy Council appeal, consisting of Rs.4000 for the security of the Privy Council costs, and Rs.8500 for the translation of papers, the pleader's fee, and other expenses of every sort in the said department.

The appeal to Her Majesty in Council was successful. The decrees of both the Lower Courts were reversed, and it was decreed that the Plaintiff (the present Respondent) should recover possession of the estate: see *Rajah Rup Singh* v. *Rani Baisni and the Collector of Etawah* (1). On the 13th of August, 1884, he was put in possession of it, and having refused to give to the purchasers any part of the eighth share, a suit was, on the 31st of July, 1885, brought against him to recover it.

The Plaintiffs had on the 31st of January, 1881, deposited in the High Court their security bond for the costs of the appeal, and they afterwards advanced for the costs of translation and remittance to *England* the sums of Rs.783, Rs.4759, and Rs.2000.

The law applicable to the case is stated in the judgment of this Board in *Ramcoomar Coondoo* v. *Chunder Canto Mookerjee* (2): "Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought

(1) Law Rep. 11 Ind. Ap. 149. (2) Law Rep. 4 Ind. Ap. 23, 47.

not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them."

The latter part of this passage is not applicable to the present case. The question is whether the agreement was so extortionate and unconscionable as to be inequitable against the Respondent. The Subordinate Judge dismissed the suit. He held the sale not to be equitable and just, but he gave other reasons for dismissing the suit which cannot be considered satisfactory. He says: "It was by no means becoming of the Plaintiffs who had made him (the Respondent) a Rajah to have now joined together in bringing him down from the dignity of a Rajah to the state of a subject, and themselves becoming the Rajahs at his expense." And he appears to have thought the impartibility of the estate to be an answer to the Plaintiffs' claim, for he says: "Thus, if the Plaintiffs' claim were to be decreed now, it would necessitate a partition of the eighth part of the estate to be awarded to them, who might be called Rajahs or Maharajahs thereof. But this would be altogether against the intent of the Privy Council ruling, and it would be as if it were cancelling the said ruling." In fact this judgment appears to their Lordships to be founded, partly at least, on reasons which are inapplicable to the question. The High Court on appeal reversed the decree of the Subordinate Judge and decreed that the Plaintiffs should recover from the Respondent Rs.1588 interest on the amount of the security bonds at the rate of 12 per cent. per annum from the date when they were deposited in Court until the allowance of

J.C. 1893 RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

the appeal by Her Majesty in Council; Rs.691 expenses of translation and printing, and Rs.990 13*a.* 4*p.* interest thereon at 20 per cent. per annum; Rs.92 also on account of translation, and Rs.106 14*a.* 4*p.* interest thereon from the 22nd of September, 1882, to the 12th of July, 1888, the date of its decree; Rs.4759 money advanced, and Rs.4711 6*a.* 6*p.* interest thereon at 20 per cent. to the same date; Rs.2000 advanced for the purposes of review and Rs.1447 5*a.* 6*p.* interest thereon, with costs in the High Court and Court below—amounting in the aggregate to Rs.19,448 12*a.* 8*p.* In their judgment the High Court say that after the appeal in the former suit from the Court of the Subordinate Judge had been dismissed the Respondent was without any means, and unless he obtained assistance on such security as he could offer he could not have filed or prosecuted his appeal to the Privy Council; that the Plaintiffs did not press him to accept the terms contained in the deed. After giving their reasons for making the above decree, which are generally that the Plaintiffs were not professional money-lenders who had taken advantage of the position of the Defendant, and had not volunteered their assistance to promote litigation, they say: "In this case, judging by the disproportion between the liability which the Plaintiffs incurred under the contract and the amount of the reward which they were to obtain in the event of the Defendant succeeding in the Privy Council, we are compelled to conclude either that the Plaintiffs did not believe that the Defendant's claim in the action was well founded and consequently entered, although unwillingly, into a gambling transaction, or that if they did believe that his claim was well founded, then the reward which, under their contract, they were to obtain, was excessive and unconscionable. In either event we could not enforce this contract in its terms." The more favourable view for the Plaintiffs is that they believed the claim to be well founded. Their Lordships adopt this, and think that the question whether the deed is contrary to public policy does not arise. They consider the finding of the High Court to be that the reward is excessive and unconscionable. It is evident from their judgment that they felt constrained to come to this conclusion. They say: "We confess that in this case our sympathies are entirely with

J. C.
1893
RAJAH MOKHAM SINGH v. RAJAH RUP SINGH.

the Plaintiffs, and we do not refuse to decree their claim for possession of the share out of any sympathy for the Defendant." A decision thus arrived at ought not to be set aside on appeal unless it clearly appears to be wrong, and their Lordships, having heard all that the learned counsel for the Appellants could urge against the decree of the High Court, are unable to say that they think that it is wrong. They will therefore humbly advise Her Majesty to affirm it, and to dismiss the appeal.

Solicitors for Appellants: *Barrow & Rogers.*

THE DELHI AND LONDON BANK, LIMITED . . . . . } APPELLANTS;

AND

OLDHAM AND OTHERS . . . . . RESPONDENTS.

J. C.*
1893
May 16;
June 17.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Civil Procedure Code, s. 435—*Power to Sign and Verify Plaint by a Corporation.*

Where a branch bank was carried on by a manager holding a power of attorney under the seal of the company, and such manager had in his absence delegated, in pursuance of such power, all his authority to an accountant, but such substituted power omitted words giving power to sue:—

Held, that such substitute had as acting manager authority under sect. 435 of the Civil Procedure Code to sign and verify a plaint by the company, being a "principal officer of the corporation" within the meaning of that section.

APPEAL from a decree of the Additional Judicial Commissioner of *Oudh* (Jan. 5, 1891), affirming a decree of the District Judge of *Lucknow* (March 31, 1890).

The effect of those decrees was to dismiss the suit without any decision on the merits, on the ground that it was not proved that Mr. *Lawson*, who instituted it for the bank, had at that time power from the bank to sue.

* *Present*:—LORD WATSON, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

J. C.
1893
DELHI AND LONDON BANK v. OLDHAM.

The facts are stated in the judgment of their Lordships.

Both Courts held that the omission of an express authority to sue from the power of attorney held by *Lawson* was fatal to his right to file the plaint on behalf of the bank.

Finlay, Q.C., and *Doyne*, for the Appellant.

Mayne, for the Respondent *Hodges*.

1893
June 17.

The judgment of their Lordships was delivered by the

HON. GEORGE DENMAN:—

This was an appeal from a decision of the Judicial Commissioner of *Oudh*, affirming a decree of the District Judge of *Lucknow*, whereby a suit was dismissed on the ground that *A. Lawson*, who had signed and verified the plaint, was not a person duly authorized to do those acts, or either of them.

The plaint was filed on the 2nd of May, 1889, and by it the Appellants sought to recover from the Respondents Rs.21,275, said to be due to them on a promissory note.

The plaint was signed as follows: "(Signed) *A. Lawson*, Acting Manager, *Delhi and London Bank, Limited, Lucknow.*"

The verification was in these words: "I, Plaintiff abovenamed, do hereby declare that what is hereby stated is true to my knowledge and belief. (Signed) *A. Lawson*, Acting Manager. *Delhi and London Bank, Limited, Lucknow.*"

On the 20th of September, 1889, the Respondent *Hodges* petitioned the District Judge that the plaint might be rejected or returned for amendment on several grounds not now material, and (in paragraphs 1 and 2 of his petition) on the grounds (1.) that *A. Lawson* was not a principal officer but a mere cashier of the bank, and not otherwise authorized to sign and verify the plaint; (2.) that acting as manager during a temporary illness, or otherwise, of an acting manager or manager, would not without a special power empower *A. Lawson* to sign and verify the plaint

There was no dispute about the facts. It was admitted that the Plaintiff bank was a corporation within sect. 435 of the Code of Civil Procedure.

That section, so far as it is applicable to the case, is in these words: "In suits by a corporation . . . . the plaint may be subscribed and verified on behalf of the corporation . . . . by any director, secretary, or other principal officer of the corporation . . . . who is able to depose to the facts of the case."

The Plaintiff bank had its head office in *London*, with branch offices at several places in *India*, including *Lucknow*. At *Lucknow* before the 23rd of November, 1887, one *Langdon* was manager at the branch bank at that place, and had been so from July, 1884. He acted under a power of attorney under the seal of the company which, in addition to words empowering him to establish an agency for "carrying on the business of the said company as bankers," contained, amongst other words, enumerating several of the most obvious duties usually discharged by the manager of a branch bank, a power to "ask, demand, and receive, and (if necessary) sue for and recover from whomsoever it may concern, all debts and sums of money, goods, property, and effects whatsoever, which are or shall be due, owing, or belonging to the said banking company on account thereof at . . . . *Lucknow*." Then followed express words authorizing *Langdon* to commence and prosecute actions and suits in respect of any matter relating to the concerns of the company at *Lucknow*. It also contained a power to *Langdon* to substitute and appoint any person to act under or in the place of him in all or any of the matters aforesaid, "the said banking company hereby agreeing to ratify and confirm whatsoever the said *Langdon* or his substitute shall lawfully do or cause to be done in or about the premises by virtue of these presents."

On the 23rd of November, 1887, *Langdon* executed a power of attorney, by which, after reciting several of the powers contained in the power of the 23rd of July, 1884, it was witnessed that *Langdon* thereby appointed *Lawson*, "accountant to the said banking company in *Lucknow*, to be the attorney of the said banking company in *Lucknow*," amongst other things, "to ask, demand, and receive all debts, &c." (as in the power to *Langdon*); but this document omitted the words "and, if necessary to sue for and recover," and the other express power to sue. It however contained these words, "And generally to act in and about the

J. C. 1893

DELHI AND LONDON BANK v. OLDHAM

premises in the same manner, and as fully and effectually as the said banking company or the said *Langdon* might or could do, and as the said *Alexander Lawson* might or could have done if he had been appointed the attorney of the said banking company in and by the said deed-poll or power of attorney in the stead of the said *Langdon*."

The decisions now appealed from proceed upon the ground that the omission of the express power to sue in the later document was fatal to the validity of the proceeding, as shewing that *Lawson* was not a person "duly authorized to sign and verify the plaint" within the meaning of sect. 51 of the Code of Civil Procedure.

That section, after enacting that the plaint is to be signed by the Plaintiff, and his pleader if any, and verified by the Plaintiff or some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, provides, "That if the Plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf."

Their Lordships are of opinion that sect. 51 of the Code, which regulates proceedings taken by or on behalf of ordinary plaintiffs, does not apply to such a case as the present, but that this case must be decided with reference only to sect. 435, which expressly applies to corporations, and that the sole question is whether *Lawson*, when he signed and verified the plaint, was one of the persons described in sect. 435 by the words "other principal officer of the corporation."

If he was, their Lordships see no reason whatever to doubt that he was within that section a person who was "able to depose to the facts of the case."

Lawson's position at the time of the action being brought, viz., on the 2nd of May, 1889, appears to have been this. He was acting under the power of attorney of the 23rd of November, 1887, being accountant to the company in *Lucknow*. *Langdon*, the manager, was away in *Cashmere*; *Banks*, whose position is not explained, but who appears to have been a leading officer of the bank in *Lucknow*, was ill with small-pox; *Lawson*, having the large powers expressly conferred upon him by the power of

attorney of November, 1887, was apparently in sole authority; at all events, he was conducting the chief banking business of the branch in *Lucknow*. In the absence of any evidence that any one else was at the time in question doing any act of management, their Lordships think it fair to presume that he was the person of all others best able to depose to the facts of the case, the action being in respect of transactions depending upon documents which would necessarily be accessible to him at the time.

In these circumstances their Lordships are of opinion that *Lawson* was then as he described himself—acting manager of the *Bank of Lucknow*, and that as such he was a "principal officer of the corporation," entitled to subscribe and verify the plaint within the meaning of sect. 435 of the Code, and that the suit was properly instituted. They will, therefore, humbly advise Her Majesty that the decrees of the Lower Courts dismissing the suit be reversed, and the suit be remanded to the Court of the District Judge to be readmitted, and that the Respondent *R. N. Hodges* be ordered to pay the Appellants' costs in both Courts from the date of his objection to the plaint and the costs of this appeal.

Solicitors for Appellant: *Lyne & Holman.*
Solicitors for Respondent *Hodges*: *Walker & Rowe.*

J. C.* 1893 June 20; July 8.

PRINCE MIRZA SULEMAN KADR . . . DEFENDANT.

AND

NAWAB MEHDI BEGAM SURREYA BAHU PLAINTIFF.

CONSOLIDATED APPEAL AND CROSS APPEAL.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Mahomedan Law—Dower—Oudh Laws Act, 1876—*Suit to enforce Dower—Amount.*

Where the amount of dower allowed by the First Court as reasonable under the *Oudh Laws Act*, 1876, in a suit by the wife to enforce an excessive stipulated amount, had been altered by the Judicial Commissioner; their Lordships, though reluctant to overrule the exercise of a discretionary jurisdiction, examined the grounds on which the alteration was made, and restored the decree of the First Court.

CONSOLIDATED APPEAL from a decree of the Judicial Commissioner (June 11, 1889), varying a decree of the District Judge of *Lucknow* (March 28, 1888).

The Plaintiff and Defendant are husband and wife, governed by Shiah law, and by birth belong to the family of the ex-kings of *Oudh*. The Plaintiff sued to recover the amount of dower settled on her by the Defendant at the date of their marriage, the 3rd of August, 1871, by two admitted registered instruments, called respectively a nikahnamah, or marriage-writing, and a deed of agreement, both bearing the same date.

By those instruments, the Defendant declared that the Plaintiff's dower was fixed by him at Rs.10 lakhs, and Rs.150 per mensem, the latter being "fixed for the purposes of her daily expenses," as a part of the dower, and secured by a bond and mortgage.

The Defendant by his written statement admitted the marriage, and the execution by him of the marriage instruments, and the payment by him down to July, 1886, of Rs.200 per mensem, alleging, however, that this was done of his own accord and not

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

under any agreement. And he contended that, "the enormous amount of dower entered in the deed of marriage and in the agreement was so entered simply to enhance the honour of the Plaintiff and the fame and greatness of the Defendant, and that the amount of dower, 10 lakhs and Rs.150 per mensem, is by law invalid by reason of the total amount being indeterminate," and that the Plaintiff was therefore only entitled to her legal dower of 500 dirams (about Rs.105), and he alleged that his income, derived from his pension and the interest of deposit promissory notes, did not exceed Rs.2933 monthly, and that the value of his other properties, immoveable and moveable, was about Rs.50,000.

The issue raised the questions whether there was any such ambiguity in the agreement for dower as to make it invalid according to Shiah law; whether the amount of dower agreed on was excessive, looking to the means of the husband and the status of the wife; and, if so, what was a reasonable amount, having regard to sect. 5 of the *Oudh Laws Act* (XVIII. of 1876).

The District Judge held that the dower was not invalid for ambiguity; and that the agreed amount "was plainly fixed for show." He gave Rs.25,000 in full of all claims for dower past and future.

The Judicial Commissioner affirmed this decree, but varied it by awarding a further monthly payment of Rs.150 from the date of decree.

Mayne, for the Defendant, contended that the dower as provided by the nikahnamah was illegal and invalid by Mahomedan law, and that the agreement of the 3rd of August, 1871, so far as it varied the nikahnamah was ineffectual, as being post-nuptial and without consideration. On the facts found, the sum awarded was excessive. No sufficient reason was given by the Judicial Commissioner for overruling the discretion of the First Court. Reference was made to Act XVIII. of 1876, s. 5, and to *Mulkah Do Alum Nowab Jujdar Bohoo* v. *Mirza Jehan Kudr* (1). The law of dower was not applicable to a monthly allowance. Even if dower was not forfeited by the wife's withdrawal from her husband, the maintenance, being a personal gift from month to month, was.

(1) 10 Moore's Ind. Ap. Ca. 252.

J. C.
1893
PRINCE MIRZA SULEMAN KADR v. NAWAB MEHDI BEGAM SURREYA BAHU.

Doyne, and *Darwood*, for the Respondent, contended that the Court below was right in holding that there was no ambiguity in the marriage contract, and that the Judicial Commissioner was right in making his addition of a monthly allowance to the lump sum awarded by the First Court. In cross-appeal, they contended that that sum of Rs.25,000 was wholly insufficient, having regard to the means of the husband and the rank of the parties. The Defendant should have been ordered to pay at least the two lakhs, which he admitted to be customary in his family, together with the arrears of the wife's allowance. Abandonment of the husband by the wife has no effect on her claim for dower; but as regards maintenance, so far as it was distinguishable from dower, it was maintenance during marriage. It was, however, not so distinguishable, and the discretion vested in the Court by the Legislature applied to the monthly allowance as part of the contract of dower.

Mayne, replied.

1893
July 8.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiff in this suit is the wife of the Defendant, and she sues to obtain the dower which on their marriage he contracted to pay. The Defendant has in all the stages of the litigation until the argument at this Bar contended on several grounds that he is not liable to pay any dower; but those defences have been overruled in the Courts below, and have rightly been abandoned on the argument of this appeal. There is now no question except as regards the amount to be paid by the husband to the wife.

The marriage took place on the 2nd of August, 1871. On the 3rd two deeds were executed by the Defendant. One, written in Persian, declares the contract completed. After a florid exordium, relating mainly to the excellence of the married state, it states that the Defendant had, in consideration of a marriage settlement and dower of the sum of ten lacs of rupees and Rs.150 per mensem, brought within the net of perpetual marriage the Plaintiff, whose personal merits it extols in highly extravagant

terms. The other deed, written in Urdu, is more business-like. It makes the same statement as to the amount of dower, and adds that the second item, viz., the annuity, is for the lifetime of the wife, and for the purposes of her personal expenses. And the Defendant then goes on to mortgage a bond for Rs.8500, and his own dwelling-house, valued at Rs.20,000, by way of security for the annuity.

The parties lived together till the year 1886, when the wife withdrew from her husband's society. Legally speaking, her withdrawal has no effect on her claim to dower. Practically it led to a discontinuance of her annuity, and to the present suit, in which she asks for a performance of the contract, and for the arrears of her annuity.

It is so common a thing among Mahomedans in this part of the world to put into marriage contracts for dower sums far larger than the husband can pay, or than the wife expects to receive, that Courts of Justice are armed with large powers over that class of contract. By the *Oudh Laws Act*, 1876, it is enacted:—

"Where the amount of dower stipulated for in any contract of dower by a Muhammadan is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by decree in favour of the plaintiff, or by allowing it by way of set-off, lien or otherwise to the defendant; but the amount of the dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife."

In this case the lady is of high status, being, as her husband is, a member of the royal family of *Oudh*. But with respect to the means of the husband, it was found by the District Judge that they consisted of property worth Rs.60,000, which was his absolutely, and of an income of Rs.2940 per mensem, which was his for his life. It further appears that at the date of the marriage he had two married wives, and three temporarily married wives; and he must then have had some children, for in the year 1887 he had four sons, two daughters, and eight grandchildren.

There is some evidence of his having had other property at some time; but it is clear enough that a contract by a man

J. C. 1893

PRINCE MIRZA SULEMAN KADR v. NAWAB MEHDI BEGAM SURREYA BAHU.

situated as the Defendant was to pay a million of rupees down, besides an annuity of Rs.1800 a year for the life of his wife, is a mere piece of bravado, allowed or possibly required by custom, but never intended for actual fulfilment.

In the exercise of the discretion given him by law, and under the above-stated circumstances, the District Judge found that Rs.25,000 was a reasonable sum to cover all demands by the wife. The Plaintiff appealed from his decree, and the Defendant lodged objections. Each party took the same grounds before the Judicial Commissioner as before the District Judge.

The Judicial Commissioner found no evidence to shew that the means of the husband were any larger than the District Judge had concluded, and he refused to grant the Plaintiff any larger sum in actual cash than Rs.25,000. But he added: "I do not, however, perceive why the Lower Court has not granted the Appellant the continuance of the monthly stipend of Rs.150 which was expressly selected by the Defendant as the mode in which he will always pay part of the Plaintiff's dower." And he decided that the monthly allowance of Rs.150 ought, under all the circumstances of the case, to be also decreed to the Plaintiff. From the decree so modified both parties have appealed to Her Majesty in Council.

Their Lordships feel much difficulty in interfering with the exercise of a discretionary jurisdiction such as this. Nevertheless, when the first Appellate Court has overruled the discretion of the Primary Judge, and has altered his decree, an ulterior Court of Appeal can hardly refuse to examine the grounds on which the alteration is made. Now, the Judicial Commissioner states that he could not perceive why the District Judge did not decree payment of the annuity. But the reason is to be found in the judgment of the District Judge, viz., that to give a lump sum is likely to avoid future trouble. That is a reason which strikes their Lordships as having considerable weight. Moreover, it clearly shews that the District Judge was looking at the case as a whole, and was considering what payment it was reasonable to substitute for the entire contract which could not take effect. The Judicial Commissioner also holds in one part of his judgment that the annuity is an integral part of the dower;

but when he comes to fix the reasonable amount, he separates the two items; he takes a distinction between that part of the dower which was payable at once because no time was fixed, and that which was payable by monthly instalments; and he thinks that the latter ought to be more specifically executed than the former. It appears to their Lordships that the District Judge took the course indicated by the statute, in considering whether the dower as a whole was excessive in reference to the means of the husband, and in considering what as a whole was a reasonable amount to be substituted. They are not intimating any general opinion against the award of an annuity in preference to, or in addition to, a sum down. Each case must depend on its own circumstances. In this case, however, they do not find any expression of opinion on the part of the Judicial Commissioner that, having regard to the Defendant's means, the District Judge had awarded too little. He does not address himself in terms to that question; he only states that the Defendant had selected an annuity as a mode of paying part of the dower, and that he could not perceive why the Court had not decreed it. Certainly the sum of Rs.25,000 does not seem to be a small sum for a man to settle who has only Rs.60,000 in absolute interest, and who had at the time of his marriage, and has now, many family obligations to answer out of his life income. But their Lordships are not in a good position for forming any opinion of their own as to what is a reasonable amount. They prefer to maintain the decree of the District Judge, because he seems to have addressed his mind most directly to that which the *Oudh* Act requires, and his reason seems to have been overlooked by the Judicial Commissioner.

The result is that they will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, to dismiss the Plaintiff's appeal to the Judicial Commissioner with costs, and to restore the decree of the District Judge. The Plaintiff must pay the costs of these appeals.

Solicitors for the Appellant: *Young, Jackson, & Beard.*
Solicitors for the Respondent: *Walker & Rowe.*

J. C.* 1893 June 21; July 15

RAMALINGAM PILLAI . . . . . PLAINTIFF;

AND

VYTHILINGAM PILLAI . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Law of Religious Foundation—Dhurmakartah—Succession.

Where it was proved that the established usage of a religious foundation was that each dhurmakartah appointed whilst in office and shortly before his death as his successor an ascetic previously initiated by him:—

Held, that the Appellant having been appointed not in good faith by a person who had ceased to be dhurmakartah, having been removed from his office by the Court for embezzlement, and being at the time subject to a charge of criminal breach of trust, was not the lawful dhurmakartah.

APPEAL from a decree of the High Court (Nov. 8, 1888) affirming a decree of the Sub-Judge of *Madura* (Sept. 4, 1886) which dismissed the Appellant's suit. The Appellant sued for a declaration that he had become the dhurmakartah of the devastanum of *Ramasweram*, by virtue of an appointment to that office made on the 30th of January, 1884, by the late dhurmakartah. This devastanum or temple is regarded by the Hindus as possessing special sanctity, and is become possessed of very large endowments. Connected with it is a mutt, or monastery of religious ascetics, and the long-established practice of the foundation was said to be that the head of the mutt should also be the dhurmakartah, or trustee and manager of the temple. The further practice was alleged, that each trustee nominates his successor, the nominee having frequently been a member of his own family.

The facts are stated in the judgment of their Lordships.

There were originally two Defendants to the suit. The first one claimed to have been appointed manager in 1867, and had brought a suit for that purpose which was tried with the one under appeal The second contended that the right of nomination vested in himself. The suit of the first Defendant was dismissed; the claim of the second Defendant was withdrawn.

* *Present*:—LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

The Subordinate Judge found that the appointment of the Appellant, which, as well as the performance of the ceremonies of initiation and investiture, was admitted, was invalid on four grounds. First, that it was made by a dhurmakartah who had already been removed from his office. Second, that the transfer of a trusteeship by one person to another was itself invalid. Third, that the succession to the mutt and the trusteeship were separable, and that the former did not carry the latter with it as a necessary consequence. Fourth, that the appointment was not made *bonâ fide*. The appellant then filed a petition, which was rejected, to admit a series of documents shewing a usage that an appointment of a successor was valid though made by a trustee who had previously been removed.

The High Court dismissed the suit on the four grounds stated by the Original Court.

Mayne, for the Appellant, contended with reference to the first ground, that the removal of the trustee had been made under Act XX. of 1863, s. 14, and that such removal only operated for the benefit of the endowment, and could not have the effect of rendering void the appointment of the Appellant in the only manner in which the constitution of the endowment admitted of such appointment being made. It was impossible on the evidence to say that an appointment of a successor by a displaced dhurmakartah was invalid on principle or opposed to the usage of the temple. As regards the second ground, that such nomination was invalid as the transfer of a trusteeship, it was contended that the principle relied upon was inapplicable to cases like the present, where such transfer was sanctioned by usage and provided by the constitution. Further, it was not a case of transfer, but of succession. As regards the third ground, it was contended that succession to the mutt carried with it succession to the trusteeship. There was nothing to shew that the mutt was merged in the temple. On the contrary, the Appellant's succession to the mutt and his enjoyment of its property was undisputed. There was, in truth, one institution to which another became an accretion. The original institution was a mutt for Suniasis who have retired from civil life. The holder of

J. C
1893,
RAMALINGAM PILLAI v. VYTHILINGAM PILLAI.

the mutt initiates, and from the initiated he chooses a leading person to be his successor. The succession goes from teacher to disciple. The *Ramasweram* pagoda became an accretion to this mutt, with this condition, that no person would be head of the pagoda who was not head of the mutt, and the head of the latter must be a Suniasi. The head of the pagoda had been dismissed, and he appointed as his successor the head of the mutt. It was a valid appointment, and the only one which could have been made. Sect. 5 of Act XX. of 1863 provides for an intermediate succession; but the Appellant was entitled to take the succession from the person who temporarily held it under appointment from the Court. It is a matter of usage that the two institutions are inseparable, and that he who is head of the one must also be head of the other. Reference was made to *Rajah Muttu Ramalinga Setupati* v. *Perianayagam Pillai* (1). As regards the fourth ground, that the appointment was not made *bonâ fide*, there was no evidence of any improper motive. The Appellant was not implicated in any improper conduct or improper motives on the part of the late trustee. The evidence was that he was a fit and proper person and preferable to the first Defendant, and, consequently, whatever the motives, the appointment was valid and in the interests of the institution.

The respondent did not appear.

1893
July 15.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal is whether the Appellant is the lawful dhurmakartah or trustee of the ancient temple at *Ramasweram* in the district of *Madura*. The temple is one of the class of religious institutions described in sect. 4 of Act XX. of 1863, and according to immemorial usage the dhurmakartah should be a "Vellala Pandaram," or ascetic of the Vellala caste. The last lawful dhurmakartah was one *Saminada Pillai, alias Setu Ramanada Pandaram*. In 1882 a suit was brought in the District Court of *Madura* against him, and three other persons

(1) Law Rep. 1 Ind Ap. 209.

who were said to be agents and managers under him, alleging an embezzlement of Rs.15,681 of money belonging to the temple by him and his agents. By the judgment given in that suit on the 2nd of March, 1893, it was found that he, *Ramanada Pandaram*, was responsible for the whole sum found to be embezzled, viz., Rs.14,855 10*a.*, and a decree was given against him for that sum with interest under sect. 14 of Act XX. of 1863. He was also directed to be removed from the trusteeship of the temple under the provisions of the same section. On the same day an order was made by the District Court appointing a manager to be in charge of the temple until a new Pandaram was appointed according to law. The judgment of the 2nd of March, 1883, was confirmed on appeal by the High Court of *Madras* on the 30th of January, 1884. Subsequently to the 2nd of March, 1883, and before January, 1884, *Ramanada Pandaram* was charged with criminal breach of trust, and was afterwards convicted of it and sentenced to suffer simple imprisonment.

On the 30th of January, 1884, the day on which the High Court confirmed the order of removal, and whilst he was under the charge of criminal breach of trust, *Ramanada Pandaram* executed a deed of appointment of the Appellant in the following terms:—

"In holding the office of dhurmakartah of *Ramasweram* devastanum, mutt, &c., we have had to conduct the management of the said devastanum through other persons, being ourself quite ignorant of reading, writing, and arithmetic, and the consequence has been that some mistakes were committed which resulted in loss to the devastanum and trouble to us. Having in view the interests of the said devastanum, mutt, athinam, &c., and considering that you are a relation of ours by blood and a descendant of the same ancestry as ourself, and that you are a man of learning and good character; we have this day and according to the established custom invested you with Kashaya (dyed cloths), imparted the Upadesam (spiritual instruction) appertaining to the Asramam (stage of life), given you the appellation of *Sethu Ramanadha Pandaram* and appointed you as dhurmakartah of the said devastanum, mutt, &c. You are to be our successor from this day with the right and privilege of appointing your

J. C. 1893

RAMALINGAM PILLAI v. VITHILINGAM PILLAI

successor, &c., and to manage and conduct all the business of the said devastanum, mutt, at all times and independent of us."

It has been laid down by this Committee that the only law applicable to such an appointment as this professes to be is to be found in custom and practice which are to be proved by testimony. Both Courts have found that according to the established usage of the religious foundation each dhurmakartah initiated a Vellala layman and made him an ascetic and thereupon appointed him as his successor, whilst in office and shortly before his death. It is clear from what has been stated that the appointment of the Appellant was not in accordance with the usage. It was made by a person who had ceased to be the dhurmakartah.

The contention of the learned counsel for the Appellant that the temple and the mutt are inseparable institutions, the mutt being the original institution, and that the head of the mutt must be the head of the temple, is not supported by any evidence. The headship of the mutt and of the dhurmakartahship appear to have been held by the same person, but in the case in which there is evidence in the record of an appointment it is to be the dhurmakartah, and this appears to be the principal office. Priority is given to it in the statement in the plaint of the usage and in the appointment of the Appellant. The Subordinate Judge says that the trusteeship being the more important of the two offices almost absorbed the headship of the mutt, so much so that the distinct existence of the mutt was very nearly forgotten, and the succession came to be regarded as for the trusteeship alone. This is in their Lordships' opinion proved by the evidence referred to in his judgment.

Another objection to the appointment of the Appellant is that both Courts have found that it was not made *bonâ fide*. The Subordinate Judge, referring to the circumstances which had been proved, says, "All these convince me that the appointment of the Plaintiff was not made *bonâ fide* in the interests of the institution, but was for the personal interests of the late trustee." The Judges of the High Court, also referring to the proved facts, say, "With these facts before us, we cannot say that the Sub-Judge was not warranted in finding that the Appellant's appointment was made by the former Pandaram in furtherance of his

own interests, and that it was not a *bonâ fide* exercise of his power, if any." This finding of both Courts invalidates the whole appointment. It applies to the headship of the mutt as well as to the office of dhurmakartah.

On both the grounds which have been stated their Lordships are of opinion that the appeal was rightly dismissed by the High Court, and they will humbly advise Her Majesty to affirm its decree and dismiss this appeal.

Solicitor for Appellant: *R. T. Tasker.*

J. C.* 1893 *June* 28; *July* 22.

MAHOMED RIASAT ALI . . . . . DEFENDANT;

AND

MUSSUMAT HASIN BANU . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Limitation Act (XV. of 1877), *Arts.* 49, 120, 123—*Suit by a Mahomedan Widow for Dower—Suit as Heiress—Act XIV. of* 1882, *s.* 43—*Cause of Action.*

A suit by a Mahomedan widow for dower is distinct from her suit to recover the whole or a portion of her husband's estate as heiress, and a final decree disposing of the former does not bar the latter under sect. 43 of Act XIV. of 1882.

Art. 120 of the *Limitation Act* applies to a suit to recover as heiress the moveable estate of the deceased. Such a suit is not for a distributive share of property as in Art. 123, or for specific moveable property wrongfully taken as in Art. 49, and is not within any other article of the schedule to that Act.

APPEAL from a decree of the Judicial Commissioner (March 26, 1889), affirming, with slight variation, a decree of the District Judge of *Lucknow* (Feb. 27, 1887).

The Respondent sued on the 1st of September, 1884, alleging that her husband was a sunni, and claiming to be entitled by custom to the whole of the share of her deceased husband (*Mosheraf Ali*, who died in 1880) in a village called *Saleh Nagar*, and to a quarter of the residue of his estate by Mahomedan law. The plaint was subsequently amended.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

J. C.
1893
MAHOMED RIASAT ALI v. MUSSUMAT HASIN BANU.

The Appellant, who was brother to the deceased husband, claimed the whole of *Saleh Nagar* as his by Government grant. As to the residue, he contended that some of it had been purchased with the income of *Saleh Nagar*, and belonged to him; that other of it was joint ancestral estate to which, by local custom, the widow had no claim except for maintenance; that certain mortgages were taken by the deceased benamee for the Appellant. As to the moveable estate, he pleaded limitation; and as to the whole suit, that it was barred by sect. 43, Civil Procedure Code, inasmuch as it should have been set up as part of a suit for dower which the Respondent had brought in 1881.

The District Court, in 1886, dismissed the suit, holding it barred by sect. 43, Civil Procedure Code, since the Respondent was bound to put forward in 1881 both her claims, viz., dower and heirship, in her suit brought in that year. As regards the moveable estate, it held that the suit was barred, since it came under Art. 49, and not Art. 123, of Act XV. of 1877.

On appeal this decree was reversed, and the suit was remanded to be tried on the merits, with the result that the District Judge decreed the Respondent's suit, and the Judicial Commissioner confirmed that decree.

Doyne, for the Appellant.

Mayne, for the Respondent.

1893
July 22.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The Plaintiff in the suit and present Respondent is the widow of *Mosheraf Ali*, who died on the 24th of November, 1880, leaving besides his widow a brother, *Saiyid Riasat Ali*, and two sisters. The amended plaint, filed on the 24th of September, 1884, alleged that the Plaintiff, according to the custom and the entries made in the settlement wajibularz, was entitled to succession and to inherit the entire property left by her deceased husband, and alternatively that according to Mahomedan law she was entitled to inherit one-fourth of his property. It then alleged that on the 28th of November, 1880, the Defendant

Riasat Ali took possession of the entire property left by *Mosheraf Ali*, and prayed for a declaration of the right of inheritance and for possession of the immoveable property with mesne profits, or any other relief which the Court might deem proper to grant.

On the 27th of October, 1884, the Plaintiff filed a list of the property claimed, both immoveable and moveable. The wajibularz referred to in the plaint was of a village, in form of a joint zemindari tenure, of which *Mosheraf Ali* had a half share. It contains in paragraph 4, relating to right of transfer and inheritance, the following statement: "A daughter, or her issue, does not get any share. If the deceased co-sharer have no male issue, but a female issue only, then indeed in that case the female issue can get a share. If all the wives be childless, they shall for their lifetime remain in possession of the deceased's inheritance in equal shares, with proprietary power." The allegation that the Plaintiff was entitled to inherit the entire property left by her deceased husband was denied by the Defendant's written statement.

The Plaintiff had on the 7th of May, 1881, brought a suit against the Defendant, in which she claimed Rs.30,000 for dower. On the 1st of August, 1882, a decree for Rs.166 was made in that suit by the Judicial Commissioner in an appeal by the Plaintiff from the order of the District Judge who had dismissed the suit. The Defendant in his written statement alleged that the Plaintiff had in that suit relinquished the claim for inheritance, and that the present suit was barred by sect. 43, Act XIV. of 1882.

The proceedings of the District Judges, before whom the case came, may be briefly noticed. The first, Mr. *Blennerhassett*, made an order which was cancelled by his successor, Colonel *Newbery*, who framed additional issues, and then dismissed the suit on the ground that it was barred by sect. 43 of Act XIV. of 1882, and also as to the moveable property that it was barred by the law of limitation, applying to it Art. 49 in the schedule to Act XV. of 1877.

The Judicial Commissioner on appeal reversed this dismissal, and remanded the case for trial on other issues which had not been decided. He held that the suit was not barred by sect. 43, and that Art. 123, and not Art. 49, applied Thereupon Colonel

J. C. 1893

MAHOMED RIASAT ALI v. MUSSUMAT HASIN BANU.

Newbery made a decree that the Defendant should deliver to the Plaintiff possession of the immoveable property, specifying it, and should pay to the Plaintiff Rs.14,725 8*a.* 9*p.* as detailed, that is — "Moveables, to value of Rs.764 12*a.*—Cash, Rs.8910 3*a.* 3*p.* — Deposit money, Rs.1300 — Mesne profits, Rs.3750 9*a.* 6*p.*"

The Defendant appealed from this decree to the Judicial Commissioner, and the Plaintiff filed objections to it. On this appeal the Judicial Commissioner made a decree, declaring the Plaintiff to possess a life interest in the immoveable property of her late husband, viz., in the half of *Saleh Nagar* and in the other immoveable property decreed to her by the District Judge, and ordering that possession should be given to her of the moveables to the value of Rs.764 12*a.* as decreed by the Lower Court, of the cash Rs.8910 3*a.* 3*p.*, and deposit money Rs.1300. Mesne profits were also allowed by the decree, amounting, after deductions on account of dower and funeral expenses, to Rs.3643 9*a.* 6*p.*

The first objection taken in the present appeal is that the suit is wholly barred under sects. 42 and 43 of the Civil Procedure Code of 1882 by the decree in the dower suit. Sect. 42 is clearly not applicable. The suit for dower was properly framed. Sect. 43 says: "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action . . . If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." The dower suit did include the whole of the claim in respect of the cause of action in the suit, viz., the right to dower and the non-payment of it. No portion of that claim was either relinquished or omitted. It cannot be said that the claim of the plaintiff as heir of her husband to the whole of his property was a portion of her claim to dower. The causes of action in the dower suit and in the present suit are distinct, and it was pointed out by this Committee in the case of *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya* (1) that the corresponding section in Act VIII. of 1859 does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall

(1) Law Rep. 12 Ind. Ap 119.

include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought. The finding of the District Judge on this issue was rightly reversed by the Judicial Commissioner.

The next objection was that the claim to cash and moveables was rightly held by the first Court to be barred by limitation. Their Lordships do not agree with either the Judicial Commissioner or the District Judge as to the article in the schedule to the *Limitation Act* which is applicable. This is not a suit for a distributive share of property (Art. 123), nor a suit for specific moveable property wrongfully taken (Art. 49). This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Art. 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the schedule. Their Lordships think this article should be applied, unless it is clear that the suit is within some other article, which in their opinion it is not, and consequently the suit as regards the moveable property is not barred.

Another objection was that mesne profits are given for *Saleh Nagar* for four years, and Art. 109 limits them to three years from when they are received. It was agreed that on this account Rs.700 should be deducted from the balance of Rs.3643 9*a.* 6*p.*, and the decree of the Judicial Commissioner should be amended by making that deduction. Lastly, it was objected that the decree of the Judicial Commissioner was erroneous in not including the moveable property in the declaration that the Plaintiff had a life interest, as the custom stated in the wajibularz applied to moveable property as well as to immoveables. This is so, and the decree should be amended by making the declaration apply also to the moveables and the cash and deposit money. Their Lordships will humbly advise Her Majesty to order the decree of the Judicial Commissioner to be amended accordingly. The parties will bear their own costs of this appeal.

Solicitors for the Appellant: *T. L. Wilson & Co.*
Solicitors for the Respondent: *Young, Jackson, & Beard*

J. C.* 1893 June 27, 28; July 15

DAKSHINA MOHUN ROY CHOWDHRY . PLAINTIFF;

AND

SARODA MOHUN ROY CHOWDHRY AND ANOTHER . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Ejectment—Disbursements for Government Revenue—Right of ejected Tenant to recover necessary Disbursements.

Where the Appellant, being in possession of revenue-paying land under a decree of the High Court, in good faith paid the revenue, failed through no fault of his own to reimburse himself out of the rents, and was afterwards ejected by the Respondents, who had obtained from the Privy Council a reversal of the said decree:—

Held, that he was entitled to recover the balance of such payments over receipts.

Quære, whether he would not have been so entitled had his possession been wrongful.

Peruvian Guano Company v. *Dreyfus Brothers* ([1892] A. C. 166) referred to.

APPEAL, by special leave, from a decree of the High Court (Feb. 9, 1891), which reversed a decree of the Subordinate Judge of *Rungpore* (Sept. 16, 1889) and dismissed the suit.

The suit was brought by the Appellant to recover Rs.7489 as the Respondents' contributory share of the Government revenue and of certain cesses paid by the Appellant in respect of four zemindaries in which the parties were jointly interested, and which revenue and cesses Appellant had been obliged to pay in order to preserve the zemindaries from sale.

The First Court gave the Appellant a decree as claimed. The High Court reversed that decree, except as to a very small portion of the claim, on the ground that the Appellant during the periods in which he made the payments in question was in possession of the Respondents' share of those zemindaries under a decree of the High Court, which was afterwards reversed on appeal by Her Majesty in Council: (see *Jagadamba Chowdhrani*

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

v. *Dakhina Mohun* (1)); and that he was therefore wrongly in possession, and not entitled to any payments made by him on behalf of the Respondents.

The judgment of the High Court is as follows:—

"We think it quite clear that the Plaintiff is not entitled to recover any outgoings in respect of lands wrongfully taken possession of by him.

"For a portion of the time he had not even the excuse of having a decree in his favour. As far as the time which elapsed between the Plaintiff's getting possession and the Privy Council decree, we think it must also be taken that he was a wrong-doer. A person who is in possession under a decree which is subsequently set aside is liable for mesne profits and cannot be said to be in rightful possession, and therefore is in wrongful possession. A person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits. This proposition is clear from *Tiluck Chand* v. *Soudamini Dasi* (2), and the other cases cited to us. The judgment of the Subordinate Judge is, therefore, we think, wrong, and should be altered, except so far as the property which remained in the possession of the Defendants is concerned."

Doyne, for the Appellant, contended that his possession up to the time when Her Majesty's Order arrived in *India* was not that of a wrong-doer, but was under the decree of a competent Court, the execution of which the Respondents had not sought to stay. It is not disputed that the payment of Government revenue was necessary to preserve the estate, that it was due in respect of the Respondents' share as well as of the Appellant's, and that the Appellant was bound to pay it to prevent a sale for arrears. It had also been shewn that the Appellant while in possession was, by reason of the opposition of the Respondents, unable to recover rents from the Respondents' tenants except to a very small extent. Reference was made to *Gopalchunder Chuckerbutty* v. *Woodoylall Dey* (3); *Tiluck Chand* v. *Soudamini Dasi* (2); *Bindu Kuar* v. *Bonda Das* (4); *Contract Code* (IX. of 1872), s. 69.

(1) Law Rep. 13 Ind. Ap. 84.
(2) Ind. L. R. 4 Calc. 566.
(3) 10 Suth. W. R. 115.
(4) Ind. L. R. 7 Allah. 660.

J. C.
1893
DAKSHINA MOHUN ROY CHOWDHRY v. SARODA MOHUN ROY CHOWDHRY.

Mayne, for the Respondent *Saroda Mohun Roy*, contended that the High Court was right in holding that the Appellant was a wrong-doer as regards the Respondents during his occupation of their land. His occupation and the payments made in consequence of such occupation were voluntary. Moreover, the Respondents, during their dispossession owing to the wrongful act of the Appellant, were neither bound nor entitled to pay the Government claims, and therefore were not liable to make reimbursement under sect. 69 of the *Contract Act*.

Doyne, replied.

1893
July 15.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The question in this case is a very short one, and it is purely a question of law.

In March, 1882, the Appellant obtained a decree from the High Court establishing his title as against the Respondents to a revenue-paying estate. In 1885 the Appellant obtained possession of the estate in execution of the decree.

The decree of the High Court was reversed by the judgment of the Privy Council in April, 1886, and in the latter part of the same year the Respondents were replaced in possession of the estate in dispute.

In the interval, while the Appellant was in possession, the Respondents actively interfered with the tenants upon the estate, and in consequence of their obstruction the Appellant received only a trifling sum on account of rents and profits. During the same period the Appellant was called upon to pay, and did in fact pay, large sums for Government revenue and other charges, assessed upon the estate and recoverable in the same manner as Government revenue.

The Subordinate Judge held that as the estate was preserved for the benefit of the Respondents by the payments which the Appellant had made he was entitled to recover from the Respondents the difference between the amount so paid and the net amount of the rents and profits which he actually received, and for which alone, owing to the conduct of the Respondents, he

was held accountable. That decision was reversed on appeal. The learned Judges of the High Court held that the Appellant, though in possession under the decree of the Court, was in "wrongful possession," and they laid it down as a proposition of law of universal application that "a person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits."

Even if the rule stated by the learned Judges admitted of no exception—a proposition which it would be difficult to maintain having regard to the recent case of *Peruvian Guano Company* v. *Dreyfus Brothers* (1) in the House of Lords—it seems to be a somewhat strong thing to hold that the Appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the highest Court in *India*. Not only was he in rightful possession and acting in good faith, but the Respondents were acting wrongfully in trying to deprive him of the fruits of his decree otherwise than by due process of law.

The Government revenue represents that portion of the produce of the land which from time immemorial has been considered in eastern countries to belong as of right to the sovereign power in the State. In *India* payment in kind has long since been commuted for a money payment, which in some cases is fixed permanently and in others is liable to revision by periodical settlements. Sometimes the Government revenue is spoken of as a quit-rent, sometimes as a land tax. But, however it may be described and however it may have been assessed, it is the first and paramount charge upon the land, and if default is made in payment the estate is sold in a summary way. The Government gives a clear title to the purchaser, and the land is lost for ever to the defaulting proprietor.

Now, it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should

(1) [1892] A. C. 166.

J. C.
1893
DAKSHINA MOHUN ROY CHOWDHRY v. SARODA MOHUN ROY CHOWDHRY.

be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. Of course he is bound to account for mesne profits, for all rents and profits which he has received, or which without wilful default he might have received. But if owing to circumstances beyond his control, and still more if in consequence of some wrongful conduct on the part of his opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity, and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts. The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognises an equity to repayment in the case of a person who not being proprietor pays the Government revenue in good faith to protect a claim which afterwards turns out to be unfounded.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed and the decree of the High Court reversed and the decree of the Subordinate Judge restored. The Respondents will pay the costs of the appeal and the costs in the High Court.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent *Saroda Mohun Roy*: *Barrow & Rogers.*

RAJAH GOBIND LAL ROY . . . . . APPELLANT; J. C.*
1893
AND
RAMJANAM MISSER AND OTHERS . . . RESPONDENTS. *June* 22; *July* 8.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Sale for Arrears of Revenue—Act XI. of 1859, *ss.* 17, 33—*Collector's Attachment for Road Cess—Procedure to set aside Sale.*

A purchaser at a sale in execution of a decree obtained by a first mortgagee in a suit to which puisne incumbrancers are not parties does not displace the latter, but stands in the position of first mortgagee.

A Government sale for arrears of revenue is contrary to sect. 17 of Act XI. of 1859 if made for arrears which have accrued while the land was subject to an order issued by the Collector under the *Cess Act*, 1880, for levy of road cess in arrears. Such order is an attachment within the meaning of sect. 17.

But sect. 33 bars a suit to set aside such sale except on grounds "declared and specified" in a previous appeal made to the Commissioner under sect. 25. That section applies not merely to cases where the sale has been irregularly conducted, but also where the sale has been illegal in consequence of some express provision for exemption having been directly contravened.

Lala Gowri Sunker Lal v. *Janki Pershad* (Law Rep. 17 Ind. Ap. 57) followed.

APPEAL from a decree of the High Court (Sept. 2, 1889), affirming a decree of the Subordinate Judge of zillah *Rungpore* (Feb. 6, 1888).

The suit was brought by the executors of the will of *Bhajirat Doss* (the son and legal representative of *Bhulam Doss*, the mortgagee hereinafter mentioned), to set aside a sale of mouzah *Khurd Muradpore* for arrears of revenue under which the mouzah was purchased by the Appellant, who was the first Defendant to the suit, and to declare the mouzah liable to sale in satisfaction of the mortgage. Both Courts below held the sale to be invalid. The facts were not disputed, and are stated in the judgment of their Lordships. The questions raised were of law involving the construction and effect of certain sections of the *Revenue Sale Act* (XI. of 1859).

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

J. C.
1893
RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

The Plaintiffs contended that the Collector had no jurisdiction to make the sale. Their grounds were—(1.) that before and at the time of sale the mouzah was under attachment by the revenue authorities pursuant to the provisions of the *Cess Act*, 1880, *Bengal* Council, sect. 99, and that, therefore, under Act XI. of 1859, sect. 17, the Collector had no jurisdiction to sell it; (2.) that the mouzah had been attached on the 25th of September, 1885, by an order of a Civil Court in execution of a decree obtained by a creditor of the then proprietor, the Defendant, *Ramjanam Misser*, and that in such case the notification of sale for arrears of revenue should, under Act XI. of 1859, s. 5, have been affixed at the various places mentioned in that section for not less than fifteen clear days preceding the date fixed for payment of the arrear of Government revenue, *i.e.*, the 28th of March, 1886, and that no such notifications were in fact made until the month of May.

The Appellant's contentions on those points were that the attachment for road cess did not bring the case within sect. 17 of Act XI. of 1859; that, as the attachment by the Civil Court had come to an end on the 18th of May, 1886, that is to say, previous to the sale for revenue on the 26th of June, 1886, the 5th section of that Act did not apply; and that all defects (if any) in the Collector's procedure were cured by sect. 33 of Act XI. of 1859, by reason of their not having been objected to by the Respondents in their appeal against the sale to the Commissioner, and by virtue of a grant of a certificate of title to the Appellant and the effect given thereto by sect. 8 of Act VII. of 1868 B.C., in curing irregularities in the service of the notices required by the two above-mentioned Acts.

The Subordinate Judge ruled that the Plaintiffs, as mortgagees, were competent to sue under sect. 33 of Act XI. of 1859. And he held that the revenue sale was invalid under sect. 5, inasmuch as fifteen days' notice had not been given prior to the 28th of March, 1886, and the estate was at that time under attachment by order of a judicial authority. He also held that under sect. 17, clause 2, of Act XI., the Collector had no power to sell, because the mouzah was at the time of sale under attachment by the revenue authorities for arrears of road cess.

He found, moreover, that the sale was for an inadequate price, and that the Collector's irregularities were the main cause of such inadequacy within the meaning of sect. 33.

Accordingly he decreed that the sale was contrary to law and should be set aside; that the Appellant should receive back his purchase-money with interest; that the rights of the Plaintiffs as mortgagees should be declared to be subsisting; and that the amount of their decree should be realized by sale of the mouzah.

The High Court in appeal agreed with the Subordinate Judge that a mortgagee could sue under sect. 33 of Act XI. of 1859. They also held that the Collector acted illegally in selling property which was under civil attachment without a notification under sect. 5, and that it was not necessary that the attachment should continue at the time of sale. They agreed that the proceedings under the *Road Cess Act* were an attachment within the meaning of sect. 17 of Act XI. of 1859, and that, in consequence, the Collector was prohibited from selling the property. In reference to the contention that the sale could not be set aside on grounds which had not been stated in the appeal to the Commissioner, and because there was no evidence that the inadequacy of the price proceeded from the irregularities complained of, the High Court held that they were bound by the Full Bench ruling in *Lala Mobaruk Lal* v. *Secretary of State for India in Council* (1), and that sect. 33 did not apply to cases of illegality as distinguished from irregularity.

Mayne, and *Ross*, for the Appellant, after contending that the Plaintiffs had no interest in the land sold for arrears of revenue, but as puisne mortgagees could only claim against the surplus proceeds of a prior sale thereof which had taken place to satisfy the claim of the first mortgagee, argued that they were not entitled to maintain this suit on any grounds which had not been declared and specified in their appeal to the Commissioner: see sect. 33 of Act XI. of 1859. That section does not merely apply to cases of irregularity. It applies equally to all cases made "contrary to the provisions of this Act"—an expression which must be taken to include contrary to all

(1) Ind. L. R. 11 Calc. 200.

J. C. 1893 RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

such former regulations on this subject as are still in force: see Act XII. of 1841, ss. 18, 25; Act I. of 1845, ss. 17, 34. Anything which is illegal within the scope of existing legislation on the subject should be relied on in the grounds specified and declared before the Commissioner under sect. 26 as a condition precedent to a suit to set aside a sale. The principle of the enactment is that revenue sales are such that the objections thereto are particularly within the knowledge of the revenue servants. The remedy is in the last resort to be applied by the Civil Court; but you must shew that you have first applied to the revenue officers in order that they may have an opportunity of dealing with your grounds of complaint in the first instance with the aid of their special knowledge on the subject. Reference was made to *Mohabeer Pershad Singh* v. *Collector of Tirhoot* (1), a judgment of *Ainslie*, J.; *Bunwaree Lall Sahoo* v. *Mohabeer Proshad Singh* (2). Two cases deal specially with sect. 33, *Baijnath Sahu* v. *Lala Sital Prasad* (3), and *Lala Mobaruk Lal* v. *Secretary of State for India in Council* (4). Again, the sale was not invalid for want of a notification under sect. 5. Selling an estate under any notice is forbidden if there be a creditor holding an attachment: see *Bunwaree Lall Sahoo* v. *Mohabeer Proshad Singh* (2).

Doyne, for the Plaintiff Respondents, contended that the sale was null and void and was rightly set aside. Under the 5th section of Act XI. of 1859, the mouzah having been under attachment by order of a judicial authority from the 26th of September, 1885, the Collector had no jurisdiction to sell for arrears fixed to be paid on the 28th of March as the last day of payment unless he had caused notification of such sale to be affixed, as directed by the Act, fifteen clear days preceding that date. This admittedly he had not done. The principle of the Act is that an estate is not to be sold thereunder unless the Collector has given himself jurisdiction by issuing two notices. The object is that attachment creditors should have notice. This was because specified tenures can be sold so as to avoid all incumbrances if the right procedure be adopted. As to sect. 17,

(1) 15 Suth. W. R. 137.
(2) Law Rep. 1 Ind. Ap. 89.
(3) 2 Beng. L. R. F. B 1.
(4) Ind. L. R. 11 Calc. 200.

J. C.
1893
RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

what had taken place, whether under the *Road Cess Act* or otherwise, was an attachment within the meaning of that section. As to sect. 33, the Courts below have been right. The Collector must be satisfied that there are arrears or the sale is null and void: *Baijnath Sahu* v. *Lala Sital Prasad* (1); *Sreemunt Lall Ghose* v. *Shama Soondaree Dossee* (2); *Thakoor Churn Roy* v. *Collector of 24-Pergunnahs* (3). A sale is absolutely null and void where there are no arrears. And a sale which falls within the legal prohibitions of the Act stands on the same footing as a sale which is legally prohibited because there is no arrear, viz., in either case the sale fails for want of jurisdiction: see *Lala Gowri Sunker Lal* v. *Janki Pershad* (4); *Bal Mokoond Lall* v. *Jirjudhun Roy* (5). Such defects and irregularities as are complained of in this case go to the root of the Collector's jurisdiction to sell, and are not cured either under sect. 33 of Act XI. of 1859, or under sect. 8 of Act VII. of 1869 B.C.

Cowie, Q.C., and *C. W. Arathoon*, for the Respondent *Ramkishen Das Khettri*, a purchaser *pendente lite* from one of the Plaintiffs, also contended that the appeal should be dismissed. The case has not been brought within sect. 33. "No suit to annul a sale made under this Act" does not apply to this case, for the sale has not been made under the Act, or in pursuance of any jurisdiction conferred by the Act. It was made in defiance of the Act and contrary to its provisions.

Mayne, replied.

1893
July 8.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

In June, 1886, mouzah *Khurd Muradpore* was sold for arrears of Government revenue. There was little or no competition; and the Appellant *Gobind Lal Roy* bought the mouzah at a price which is said to have been much below its real value. The Plaintiffs, claiming to be interested in the property as

(1) 10 Suth. W. R. F. B. 66; S. C. 2 Beng. L. R. F. B. 1.
(2) 12 Suth. W. R. 276.
(3) 13 Suth. W. R. 336.
(4) Law Rep. 17 Ind. Ap. 57.
(5) Ind. L. R. 9 Calc. 271, 275.

J. C. 1893

RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

mortgagees of 8 annas, appealed to the Commissioner of Revenue against the sale. In their petition of appeal they alleged various grounds of objection, all of which are now admitted to be untenable. The appeal was rejected on the 23rd of October, 1886, when the sale became "final and conclusive" under sect. 27 of Act XI. of 1859, and a certificate of title was issued to the purchaser. Then the Plaintiffs appealed to the Board of Revenue; but that appeal was declared incompetent. At last, on the 19th of October, 1887, just before the expiration of a full year from the date of the Commissioner's order, the Plaintiffs brought this suit to annul the sale and to enforce their mortgage.

The High Court, as well as the Subordinate Judge, held the Plaintiffs entitled to relief. From that decision this appeal is brought.

The grounds of appeal in substance are these:—

(1.) That the Plaintiffs had no interest in the property at the date of the sale for arrears of revenue.

(2.) That the sale was authorized by Act XI. of 1859, and duly made under the Act.

(3.) That if the sale was contrary to the provisions of the Act on the grounds now relied on, sect. 33 of the Act is a bar to the suit, because those grounds were not "declared and specified" in the appeal to the Commissioner.

As regards the Plaintiffs' title to sue, the learned counsel for the Appellant pointed out that the plaint on the face of it shewed that the property on which the Plaintiffs claimed to have a charge had been sold before the date of the Government sale, under a decree obtained by a prior mortgagee against the mortgagor; and they insisted that such a sale has the effect of displacing puisne mortgagees and leaving them with nothing but a claim against the surplus proceeds, if any. That, however, in their Lordships' opinion, is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne incumbrancers are not parties. In the present case the purchaser under the decree has never apparently disputed the right of the Plaintiffs as against

the land. He was a party to a suit brought by the Plaintiffs to enforce their mortgage, which was pending at the date of the Government sale. It is clear from the terms of the decree made in that suit that the right of the Plaintiffs against the land would have been established but for the Government sale. He is a party to this suit; and all he claims here is the position of first mortgagee. The first ground of appeal therefore fails.

Both Courts have held that the Government sale was contrary to the provisions of sect. 5 and sect. 17 of Act XI. of 1859. Sect. 17 declares that "no estate held under attachment by the revenue authorities otherwise than by order of a judicial authority shall be liable to sale for arrears accruing while it was so held under attachment." In the present case the estate was sold for arrears which accrued while it was subject to an order issued by the Collector under the *Cess Act*, 1880, for the levy of road cess in arrear. This order, which is termed a "prohibitory order," forbids payment of rent to any person but the Collector until the amount due for road cess is satisfied, and gives priority to the claim for road cess over any demand or claim other than the demand of Government revenue. It was said that such a prohibitory order is not an attachment. In their Lordships' opinion it is an attachment both in form and substance, and an attachment within the letter and meaning of sect. 17 of Act XI. of 1859. Their Lordships, therefore, have no difficulty in holding that the Government sale was contrary to the provisions of sect. 17. Whether it was also contrary to the provisions of sect. 5 is a more difficult question, and as the decision of that question is not necessary for the determination of this appeal, their Lordships think it better not to express an opinion upon it.

The third ground of appeal is one of more general interest. It ought perhaps to be considered as concluded by the judgment of this Board in the case of *Lala Gowri Sunker Lal* v. *Janki Pershad* (1), which was pronounced just after the decision of the High Court in the present case. But that case was heard *ex parte*. The point had not been taken in the Courts below, and no authorities were cited. The question is one of so much importance that their Lordships are glad to have an opportunity of

(1) Law Rep. 17 Ind. Ap. 57.

J. C. 1893

RAJAH GOBIND LAL ROY v. RANJANAM MISSER.

re-considering their opinion, after a full argument by counsel on both sides and a discussion of all the Indian authorities bearing on the subject. It is not necessary to go through the cases. They shew some difference of opinion undoubtedly. But Mr. *Doyne* was apparently justified in saying that the view which prevailed in *India* at the date of the institution of this suit was that in cases of illegality, as distinguished from cases of irregularity properly so called, a suit might be brought to set aside a sale on grounds not declared and specified in an appeal to the Commissioner. Their Lordships will now consider whether there is any real ground for that distinction.

Act XI. of 1859 was an amending Act. It was passed, as appears from the title and preamble, in order to improve the law relating to sales of lands for arrears of revenue. The machinery and procedure adopted in the Act for the most part were old, but provisions were introduced in order to give greater protection to persons interested in land subject to Government revenue against the loss of their property through their agents' fraud or their own inadvertence.

Sect. 3 enacted, that upon the promulgation of the Act the Board of Revenue should determine upon what dates all arrears of revenue should be paid up in each district under their jurisdiction, "in default of which payment" the Act declares that "the estates in arrear in those districts except as hereinafter provided shall be sold at public auction to the highest bidder." Then follow minute provisions which may be divided into two classes. One set of provisions prescribes the manner in which sales for arrears of revenue are to be published and conducted, and the dates to be observed in the various proceedings. The other set of provisions in certain specified cases exempts land from sale though in arrear for Government revenue, or declares that under particular circumstances the land is not liable to sale, or that the sale shall not be legal. The expressions vary, but there is no difference in substance. It merely comes to this, that in particular cases which are carefully specified exceptions are made to the generality of the rule laid down in sect. 3.

Sect. 25 declares that the Commissioner of Revenue may

receive an appeal against any sale made under the Act, if preferred to him on or before the 15th day from the date of sale, or if preferred to the Collector for transmission to the Commissioner on or before the 10th day from the day of sale "and not otherwise," and that the Commissioner shall be competent in every case of appeal so preferred to annul any sale made under the Act "which shall appear to him not to have been conducted according to the provisions of" the Act. This section is repealed by Act VII. of 1868, but it is re-enacted, with an extension of the time for appealing and some other variations not material for the present purpose, by sect. 2 of the Act of 1868.

Sect. 33 of the Act of 1859 declares that no sale for arrears of revenue made after the passing of the Act "shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of the Act, and then only on proof that the Plaintiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner under sect. 25," and it goes on to declare that no suit to annul any sale made under the Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive.

There are no doubt some provisions and some expressions in these sections which appear to favour the view presented by the learned counsel for the Respondents. Their Lordships cannot help being struck by the difference between the times allowed for an appeal to the Commissioner and the time allowed for the institution of a suit to set the sale aside. The periods of fifteen days and ten days mentioned in sect. 25 are extended by Act VII. of 1868 to sixty days and forty-five days respectively. So that the difference is not quite so marked now. But the difficulty remains. Why should a whole year be allowed for the institution of a suit to set aside a sale for arrears of revenue, if the Plaintiff in all cases is to be confined to the grounds of objection declared and specified in an appeal made to the Commissioner, and the suit therefore is in reality nothing but an appeal from the

J. C. 1893 RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

Commissioner's order? Then the direction in sect. 25 to the effect that the Commissioner may annul any sale "which shall appear to him not to have been conducted according to the provisions of this Act" seems to point rather to an irregularity in the conduct of the sale than to a sale in contravention of some express provision of the Act. The reference to "irregularity" in sect. 33 is even stronger, for it seems to imply that in every case to which that section applies the complaint must be a complaint on the score of irregularity.

Giving, however, full weight to these considerations, their Lordships, having regard to the scheme of the Act and the express direction contained in sect. 33, are of opinion that in every case where a sale for arrears of revenue is impeached as being "contrary to the provisions" of Act XI. of 1859, no grounds of objection are open to the Plaintiff which have not been declared and specified in an appeal to the Commissioner.

In the opinion of their Lordships, a sale is a sale made under the Act XI. of 1859 within the meaning of that Act when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened.

As regards the reference to irregularity in sect. 33, upon which the argument mainly turned, it is to be observed that the particular sentence in which it occurs—"and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of"—is not to be found in the earlier Acts of 1841 and 1845. It seems to have been borrowed, without perhaps sufficient consideration, from the Code of Civil Procedure, Act VIII. of 1859, which was before the Legislature at the same time as Act XI. Without that sentence the arguments on behalf of the Respondents would have been deprived of much of their force. It is difficult to suppose that the introduction of that sentence into the Act of 1859 could have been intended to have the effect of excluding from sect. 33 all cases of illegality as distinguished from irregularity.

Their Lordships desire to add that in their opinion it would have been most unfortunate if they had been compelled to adopt the construction placed upon the Act by the Courts in *India*. Sales for arrears of revenue are of constant occurrence; anything which impairs the security of purchasers at those sales tends to lower the price of the estates put up for sale. It is therefore of the utmost importance in the interest of the revenue-paying population of *India* that all questions that can arise as to the validity of a sale for arrears of revenue should be determined speedily, and that when the sale has once been confirmed by the Commissioner the purchaser should not be exposed to the danger of having his sale set aside on new grounds.

One point remains to be noticed. It was contended that the objection founded on sect. 17 was in fact brought forward in the appeal to the Commissioner, though not stated in the petition of appeal to him. This contention rests solely on a passage in the Commissioner's judgment. He says: "A petition has this day been put in, pleading that the estate was attached for arrears of road cess before the March kist fell due, and that it therefore ought not to have been sold at this stage of the proceedings. However, this further plea cannot be admitted." No other trace of this petition is to be found in the Record. It was not referred to in the judgment on the appeal to the High Court. The learned Judges of the High Court say, "If sect. 33 does apply, then it appears to us clear that the suit must fail, because the grounds now taken under sects. 5 and 17 of Act XI. were not declared and specified as sect. 33 requires in the appeal preferred to the Commissioner." Under these circumstances, assuming that in an appeal to the Commissioner the Appellant is not tied down to the grounds alleged in his petition, and that after the time for appealing has passed he may bring forward sound objections so long as an appeal on grounds that are unsound is pending, their Lordships would not be justified in also assuming that the petition to which the Commissioner alluded, if it was put in by the Plaintiffs, was put in at a time when it could have been taken into consideration. The inference seems to be that it was not presented until the proceedings were practically closed.

J. C. 1893 RAJAH GOBIND LAL ROY v. RAMJANAM MISSER.

In the result, therefore, their Lordships will humbly advise Her Majesty that this appeal should be allowed and the decrees of the Courts below reversed, and the suit dismissed. The Respondents must pay the costs of this appeal and the costs in the High Court, and the Plaintiffs must pay the costs of the Appellant in the Court of the Subordinate Judge.

Solicitors for the Appellant: *Barrow & Rogers.*

Solicitors for the Plaintiff Respondents: *T. L. Wilson & Co.*

Solicitor for the Respondent *Ramkishen Das Khettri: H. Sowton.*

J. C.* 1893 *March* 16; *June* 24.

TASSADUK RASUL KHAN . . . . . APPELLANT;

AND

AHMAD HUSAIN AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Execution Sale—Civil Procedure Code, ss. 289, 290, 311—*Material Irregularity.*

Sect. 289 of the Civil Procedure Code provides that a copy of a proclamation of sale shall be fixed up in the Court-house after it has been posted in the villages, and, consequently, sect. 290 is not complied with unless the thirty days mentioned therein have elapsed since both fixing and posting have taken place. Such non-compliance is material irregularity within the meaning of sect. 311; but a sale in disregard of sect. 290 is not a nullity, and will not be set aside unless direct evidence of substantial injury resulting from the irregularity has been given.

APPEAL from an order of the Judicial Commissioner (March 16, 1891), reversing, with costs, an order of the District Judge of *Lucknow* (Oct. 14, 1890).

The Appellant was an execution creditor of the Respondents, and at the sale in execution of his decree against them and others, which took place on the 20th of March, 1890, bid for and purchased the properties in suit.

On the 12th of April, 1890, the Respondents filed their petition of objections to the sale under sect. 311 of the Civil Procedure

* *Present:*—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

Code, seeking to set it aside on these grounds: (1.) That the proclamation of sale was fixed up on the door of the Court-house after the 20th of February, 1890, and that, therefore, the sale of the said property, which took place on the 20th of March (within thirty days of such proclamation), was bad for irregularity under the provisions of sect. 290 of Act XIV. of 1882. (2.) That the proclamation of sale was not made by beat of drum, or so as to give information to the general public. (3.) That the cesses, profits, and revenue of the property had not been rightly entered in the proclamation. (4.) That the Appellant, the decree holder, had by entreaties and threats deterred other purchasers from bidding. (5.) That the property was sold at an undervalue.

The Appellant maintained that the sale was not bad for material irregularity, and pleaded (1.) that the Respondents had suffered no damage by the sale, as the price the Appellant had paid was in excess of the intrinsic value of the property; (2.) that after the proclamation of sale had been issued and posted, the Respondents had on the 10th and 14th days of March, 1890, filed petitions asking for a certificate under sect. 305 to enable them to raise, by mortgage, money sufficient to pay off the Appellant's decree, and praying that the sale might be adjourned for two months to enable them to raise thereby money enough to pay off the debt.

The validity of the sale turned on the following sections of the Code:—

Sect. 274 directs that, in the case of immoveable property, the order of attachment "shall be proclaimed at some place in or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house, and, when the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the district in which the land is situate.

Sect. 287 prescribes what information is to be given by the proclamation of sale to intending purchasers in respect to charges on the property to be sold, and generally for their guidance.

Sect. 289, as amended by Act VII. of 1888, sect. 29, enacts that "the proclamation shall be made in manner prescribed by

J. C. 1893

TASSADUK RASUL KHAN v. AHMAD HUSAIN.

sect. 274, and a copy thereof shall then be fixed up in the Court-house, and in the case of land paying revenue to Government also in the Collector's office."

Sect. 290 enacts that "no sale under that chapter shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least thirty days, in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court-house of the Judge ordering the sale."

Sect. 311 gives to any person whose immoveable property has been sold under that chapter the right of applying to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it, but that no sale should be set aside on that ground, unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

The District Judge held that all the proclamations relating to the sale were duly posted more than thirty days before the sale, and that there was no material irregularity on which the sale ought to be set aside. He was further of opinion that the conduct of the Respondents in filing the petition of the 10th and 14th of March amounted to a waiver of any objection they might have had, and, lastly, that the Appellant had not deterred others from bidding, and that the Respondents had not proved that they had sustained any substantial injury, even if there had been any material irregularity in the publishing and conduct of the sale. The Judicial Commissioner held, that even if the proclamation had in fact been posted at the Court-house on the 15th day of February, 1890—which he doubted—the provisions of sect. 290 of the Civil Procedure Code had not been obeyed, inasmuch as the process-server proved that the only notice he had posted at the Court-house was posted before the making of the proclamation provided for by sect. 289, and that, in fact, as no copy of the proclamation had been posted at the Court-house after the making of the said proclamation under the provisions of sects. 274 and 289, he was bound to take it that no copy of the proclamation had, in fact, ever at all been posted in the Court-house, and that therefore the sale was irregular, and the Respondents were

entitled to have the sale set aside under the provisions of sect. 311 of the Civil Procedure Code.

He was further of opinion that to set aside a sale under such circumstances it was not necessary for the objectors to prove substantial injury, but that substantial injury to the owner of the property might be inferred to have resulted, as the law had not been complied with.

He finally found, that though there had been a misdescription as to the income of the said property, he was not prepared to say that such misdescription resulted in an inadequate price being bid for the said property at the auction.

He was therefore of opinion that the appeal should be allowed, and the judgment of the District Judge reversed, and further, that it was not enough to set aside the sale only in so far as it affected the half-share of the Respondents, but that the sale, if bad, was bad as a whole, and was a nullity, and must therefore be set aside altogether, and he made his order accordingly.

Branson, for the Appellant, contended that this order was wrong. There had been no proof of any material irregularity in publishing or conducting the sale. If there had been it had been waived by the Respondents, who took no objection in those respects in their petitions of the 10th and 14th of March. Even if there had been material irregularity, there was no evidence that the Respondents had sustained substantial injury thereby, and accordingly they were not entitled to have the sale set aside. He referred to *Olpherts* v. *Mahabir Pershad Singh* (1); *T. R. Arunachellam Chetti* v. *V. R. Arunachellam Chetti* (2); *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi* (3); *Tripura Sundari* v. *Durga Churn Pal* (4). Reference was also made to *Jasoda* v. *Mathura Das* (5), following *Bakshi Nand Kishore* v. *Malak Chand* (6); *Sheo Prasad* v. *Hira Lal* (7); *Birj Mohun Thakoor* v. *Bai Uma Nath Chowdhry* (8).

Doyne, for the Respondents, contended that the Judicial

(1) Law Rep. 10 Ind. Ap. 25.
(2) Law Rep. 15 Ind. Ap. 171.
(3) Ind. L. R. 7 Calc. 34.
(4) Ind. L. R. 11 Calc. 74.
(5) Ind. L. R. 9 Allah. 511.
(6) Ind. L. R. 7 Allah. 289.
(7) Ind. L. R. 12 Allah. 440.
(8) Law Rep. 19 Ind. Ap. 154.

J. C. 1893

TASSADUK RASUL KHAN v. AHMAD HUSAIN.

Commissioner was right in discrediting the evidence to the effect that the proclamation had been fixed up at the Court-house within thirty days before the sale. Assuming that such notice had been fixed up, still the fixing was done before the posting in the villages. Consequently it was a nullity, for there was no compliance with the provisions of sect. 289, and the sale was irregular and void. Further, it was proved that the Appellant did improperly deter intending purchasers. The sale was invalid on that ground: see *Rukhinee Bullubh* v. *Brojonath Sircar* (1). He contended that the sale was wholly void. So far as his contention rested on the presence of material irregularity, there was evidence of resulting substantial injury.

Branson, replied.

1893 *June* 24.

The judgment of their Lordships was delivered by

LORD MORRIS :—

In this case the Respondents, who were judgment-debtors of the Appellant, filed a petition in the Court of the District Judge of *Lucknow* on the 12th of April, 1890, whereby they sought to set aside the sale of certain villages which had been sold by auction by an order of that Court. The principal ground relied upon by the Respondents for setting aside the sale was, that it took place before the expiration of thirty days required by sect. 290 of the Civil Procedure Code to intervene between the date on which the copy of the proclamation had been fixed up in the Court-house and the day of sale. The matter of this petition came on for hearing before the District Judge on the 7th of June, 1890, and subsequent days. On the 14th of October, 1890, the District Judge dismissed the Respondents' petition and confirmed the sale. The Respondents appealed to the Judicial Commissioner of *Oudh*, who on the hearing of such appeal on the 16th of March, 1891, allowed the appeal, and set aside the sale.

The Appellant was mortgagee of the four villages sold, and he had on the 12th of October, 1889, obtained a decree on foot of

(1) Ind. L. R. 5 Calc. 308.

his mortgage. In execution of this decree he caused a proclamation of sale to be issued from the Judge's Court on the 13th of February, 1890, the sale being announced to take place on the 20th of March following. The main provisions of the Civil Procedure Code regulating sales are as follows :—

Sect. 274 provides that in the case of immoveable property the order of attachment "shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house."

Sect. 287 prescribes the statements and information to be given by the proclamation of sale.

Sect. 289 provides that "the proclamation shall be made in manner prescribed by sect. 274, on the spot where the property is attached, and a copy thereof shall then be fixed up in the Court-house."

Sect. 290 provides that no sale shall take place "until after the expiration of at least thirty days in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court-house of the Judge ordering the sale."

It appears upon the evidence that the proclamation of sale was posted in the Court-house on the 15th of February, 1890, by the officer who on the 18th and 19th of February posted the proclamation in the villages. The District Judge held that all the proclamations relating to the sale were duly posted more than thirty days before the sale on the 20th of March, 1890. Their Lordships cannot concur in that finding, for although the *terminus a quo* under sect. 290 is the fixing up in the Court-house, and although that took place more than thirty days before the sale, yet the provision of sect. 289 prescribes that the posting in the villages should precede the fixing up in the Court-house, and consequently the *terminus a quo*, from which the period of thirty days should run, became at the best the 19th of February, which would be short of the thirty days required to intervene before the sale. On appeal before the Judicial Commissioner he held that the provisions of sect. 290, prescribing the thirty days, had not been obeyed, and that without anything more the Respondents

J. C. 1893

TASSADUK RASUL KHAN v. AHMAD HUSAIN.

were consequently entitled to relief under the provisions of sect. 311.

That section, under which the petition of the Respondents, owners of one-half of the villages, was presented, provides that "the decree-holder or any person whose immoveable property has been sold . . . . may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity."

It was contended on the part of the Respondents that the non-compliance with the interval of thirty days between proclamation and sale made the sale a nullity. Their Lordships cannot accede to that contention. The proceeding in this case was brought by the Respondents under sect. 311, which deals with material irregularity. The noncompliance with the provisions for posting was a material irregularity. But in the cases of *Olpherts* v. *Mahabir Pershad Singh* (1) and *T. R. Arunachellam Chetti* v. *V. R. Arunachellam Chetti and Another* (2) it was held that in all cases of irregularity under sect. 311 evidence must be given of substantial injury having resulted. In the present case the decree-holder failed to comply with the full requirements of sect. 290, but both on principle and authority their Lordships are of opinion that the case must be treated, as the Respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of sect. 311, and in the application of that section it was incumbent on the Respondents to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of sect. 290. Their Lordships cannot accept the judgment of the Judicial Commissioner, that loss is to be inferred from the mere fact that a sale was had without full compliance with the provisions of sect. 290. The section clearly contemplates direct evidence on the subject.

The other objections to the sale were mostly formal, and were overruled by the District Judge on the facts.

(1) Law Rep. 10 Ind. Ap. 25. (2) Law Rep. 15 Ind. Ap. 171.

Their Lordships are of opinion that the order of the District Judge dismissing the petition and confirming the sale was right, and they will humbly advise Her Majesty that the judgment of the Judicial Commissioner ought to be reversed, and that the appeal to the Judicial Commissioner ought to be dismissed with costs, and the order of the District Judge restored. The Appellant will have his costs of the appeal.

J. C. 1893 TASSADUK RASUL KHAN v. AHMAD HUSAIN.

Solicitor for Appellant: *T. L. Watkins.*
Solicitors for Respondents: *Barrow & Rogers.*

HURRINATH CHATTERJI . . . . . PLAINTIFF;

AND

MOHUNT MOTHOOR MOHUN GOSWAMI . DEFENDANT.

J. C.* 1893 *May* 11; *June* 17.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Law of Limitation—Act IX. of 1871, *Art.* 142—*Act XV. of* 1877, *Art.* 141—*Res judicata—Decree against Hindu Daughter.*

To a suit by one of three reversionary heirs against another to recover possession of two shares of the estate, the Defendant pleaded that he had been sued in respect of the whole estate by the daughter of the last full proprietor (while she represented that estate), and that, a final judgment having been given in his favour, the Plaintiff was bound thereby in respect of his title to both shares claimed:—

Held, that this plea was correct, and that the Plaintiff was not entitled to the shares in suit within the meaning of Art. 141 of the 2nd schedule of the *Limitation Act* of 1877, or Art. 142 of the Act of 1871, so as to possess a cause of action in respect thereof on the daughter's death.

The rule in the *Shivagunga Case* (9 Moore's Ind. Ap. Ca. 539), to the effect that an adverse decree against a Hindu widow binds those claiming in succession, applies equally to the case of the daughter.

APPEAL from a decree of the High Court (May 27, 1890) reversing a decree of the Subordinate Judge of *Cuttack* (July 13, 1888).

The facts are stated in the judgment of their Lordships.

The Subordinate Judge held that the suit was not barred by limitation, as the Plaintiff's cause of action arose on his mother's

Present:—LORD WATSON, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

J. C.
1893
HURRINATH CHATTERJI v. MOHUNT MOTHOOR MOHUN GOSWAMI.

death, and he had twelve years from that date within which he could sue under Art. 141 of the 2nd schedule of Act XV. of 1877; and that the suit was not barred as *res judicata*, the Plaintiff not being bound by the decree made against his mother because he was not claiming through her.

The High Court, on the other hand, came to a different conclusion on both points. The material portion of their judgment is as follows:—

"So far as the question of limitation is concerned, we are of course bound to follow the decision of a Full Bench of this Court in the case of *Srinath Kur* v. *Prosunno Kumar Ghose* (1). That was a case somewhat similar to this, in that the contending parties were the sons of two daughters of the ancestor from whom each of them derived title. It was found that the mother of the plaintiff had been out of possession for upwards of twelve years, and it was contended that under those circumstances the adverse possession which extinguished her right extinguished that also of the reversioner, her son. The Court, without going into the question whether the right was or was not extinguished, held that, under the present law of limitation, a reversioner who succeeds to immoveable property has twelve years in which to bring his suit from the time when his estate falls into possession, and that the plaintiff was therefore entitled to the properties claimed. It may be observed that that case was decided under Art. 140, and not Art. 141, of the *Limitation Act*, which seemed directly in point. It did not, therefore, directly overrule the case of *Saroda Soondari Dasi* v. *Doyamoyi Dasi* (2), in which *Jackson* and *Tottenham*, JJ., held that Art. 142, Act IX., 1871, which corresponds with Art. 141, Act. XV., 1877, only covered a case in which the person claiming succeeded to a certain right which was in being on the widow's death, and that if the widow's right was barred before her death the reversioner would not be entitled to possession. The effect, however, undoubtedly was to overrule it, as it was alluded to in the referring order, and was in fact the case which led to the reference. If, therefore, the question in the present case was merely one of limitation, we should be bound to follow the Full Bench decision, and hold

(1) Ind. L. R. 9 Calc. 934. (2) Ind. L. R. 5 Calc. 938.

that the suit was within time whether all or any of *Ramanundun's* daughters had or had not been in possession. The decision of the Full Bench does not, however, touch the question whether the reversioner is not bound by a decree adverse to the person in whom the estate is for the time being vested, and there is the clearest and highest authority that he is bound. In the *Shivagunga Case* (1) their Lordships of the Privy Council, alluding to a Hindu widow who had brought a suit for possession of her husband's estate, say (at p. 604), "that unless it could be shewn that there had not been a fair trial of the right in that suit, or, in other words, unless that decree would have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to her.' 'For,' they say, 'assuming her to be entitled to the zemindary at all, the whole estate would for the time being be vested in her absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance seems to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.' The principle thus laid down was applied by the Privy Council in the case of *Pertab Narain Singh* v. *Triloki Nath Singh* (2).

"The same principle was affirmed in the case of *Nobin Chunder Chuckerbutty* v. *Guru Pershad Das* (3), decided by a Full Bench of this Court. The question there was whether adverse possession against a Hindu female heir, which would bar her suit if she were alive, will equally bar that of the reversioner; and Sir *Barnes Peacock*, after citing the *Shivagunga Case* (1), says: 'If the female heir in the present case had sued the wrong-doer, and without fraud or collusion had failed to turn him out of possession, the reversionary heirs would have been bound by

(1) 9 Moore's Ind. Ap. Ca. 539.
(2) Law Rep. 11 Ind. Ap. 197; Ind. L. R. 11 Calc. 186.
(3) B. L. R. Full Bench Rulings, p. 1008.

J. C. 1893 HURRINATH CHATTERJI v. MOHUNT MOTHOOR MOHUN GOSWAMI.

the decision.' Again, in *Jugol Kishore* v. *Jotindro Mohun Tagore* (1), their Lordships of the Privy Council cite the *Shivagunga Case* (2) as shewing that in a suit against the widow in respect of the estate the decision would be binding upon the reversionary heir. That was a case in which a decree had been obtained against the widow in possession of the estate, and in execution of the decree the estate was sold. It was held, under the circumstances of the case, that the entire estate, which she fully represented, was sold, and not merely her life-interest in it. There is no difference as regards their representation of the estate between the estate of a Hindu widow and that of a daughter; and it would be the same if the suit failed on proof of an adverse title or on a plea of adverse possession and limitation. It was argued by the Advocate-General that the principle enunciated in the *Shivagunga Case* (2) would only apply when the suit was against a stranger, and that it would have no application when the suit was against a member of the same family. No doubt *Mothoor Mohun*, who was the defendant in the suit brought by *Sampurna*, and who is the Defendant in the present case, is himself one of the reversionary heirs. In the *Shivaganga Case* (2) the suit was by a widow of the deceased owner against his nephew, the questions involved being whether there had been a division, and whether the property was self-acquired. It was held that a decree properly obtained against the widow would bind all the reversionary heirs. We see, however, no ground for the distinction contended for. The estate is vested in the widow or daughter for the time being, and she represents it absolutely for some purposes. She cannot so represent it against some persons and not against others, and we do not see why a reversioner setting up an adverse title and adverse possession is in a worse position than any one else.

"It is not contended that the decree in the suit which *Sampurna* brought would not put the Plaintiff completely out of Court if he is bound by it, or that that decree was not properly and fairly obtained; there is no reason to doubt that it was so obtained,

(1) Law Rep. 11 Ind. Ap. 66; Ind. L. R. 10 Calc. 985.
(2) 9 Moore's Ind. Ap. Ca. 539.

and the Plaintiff admits that he carried on the suit on his mother's behalf. We think, therefore, that on the authorities cited the Plaintiff is bound by the decree in the previous suit, and that he cannot maintain this suit, either as regards his own one-third share or as regards the share acquired from *Thakoordas*, who is equally bound by that decree.

"The position may be anomalous. According to the decision of the Full Bench of this Court cited above (1), no length of possession adverse to the widow would bar the reversioners, who have twelve years reckoned from the widow's death within which to sue; but if the widow sues to recover the property from the person in adverse possession and fails, the reversioners are bound by the decree. The decision of the Full Bench rests upon the words of the present *Limitation Act*; but it certainly seems to strike at the principle on which *Nobin Chunder Chuckerbutty* v. *Guru Pershad Das* (2) was decided, although it was simply held that the law of limitation by which the latter case was governed had been altered. However this may be, the question which we have to decide was not before the Full Bench and was not decided by it, and we are bound to follow the high authority which we have cited."

Doyne, for the Appellant, contended that, in deciding that he was bound by the decree made in his mother's suit, the judgment appealed from had decided on an issue which had not been recorded either in the High Court or in the Court below. It had, moreover, decided upon oral and inadmissible evidence as to the effect of a decree which was not produced (see *Indian Evidence Act*, sects. 22, 59, 61, 62, 64, and 65, and Civil Procedure Code, 139 and 140). In the absence of that decree it was impossible for the Court to decide satisfactorily whether under sect. 13 of the Civil Procedure Code any of the issues in the present suit were "directly and substantially or at all in issue in the former suit," and were disposed of in that suit. Reference was made to Art. 141, Sched. II. of Act XV. of 1877, and it was contended that the effect thereof was to give a fresh starting-point to the reversioner at the death of the female

(1) Ind. L. R. 9 Calc. 934. (2) B. L. R. Sup. vol. p. 1008.

J. C. 1893

HURRINATH CHATTERJI v. MOHUNT MOTHOOR MOHUN GOSWAMI.

proprietor (see *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1), a case decided under Act XIV. of 1859). The adverse title in this case is founded on something which is independent of limitation, and then comes an Act which lets the reversionary heir sue within twelve years from the time when his right to possession accrued. [LORD WATSON:—But you must shew that the new law gives a right of action to the reversioner notwithstanding that the widow's right of possession has been extinguished by decree.] The Defendant cannot plead adverse possession which ran only against the mother. [SIR R. COUCH:—The question is as to the effect of a decree against the mother—does it bind the whole estate?] See the *Shivagunga Case* (2); but the decree in this case against the daughter was founded on limitation, and such a decree only bound the particular plaintiff who was suing. It was not a decree on the merits, and the Plaintiff in this case was bound by a different rule of limitation, viz., one which gave him his mother's death as the starting-point. A decree founded on limitation is excepted from the *Shivagunga Case* (2). It bound the Plaintiff in that suit but not the estate, since limitation has regard to the cause of action on which each particular suit is brought. Reference was also made to *Srinath Kur* v. *Prosunno Kumar Ghose* (3).

C. W. Arathoon, for the Respondent, contended that the High Court was right in deciding that the suit was barred as *res judicata*: see *Shivagunga Case* (2), which applies to all female heirs, daughters as well as widows. With regard to the admissibility of the evidence objected to the plaintiff filed a copy of the judgment of the Subordinate Judge, dated the 29th of June, 1881, and the plaint, written statement, issue, ground of appeal, and judgment of the High Court all refer to it. [SIR R. COUCH:—Filing the document is not the same thing as putting it in evidence in the suit, and the High Court refers to the oral evidence relating to the decree.] It was contended that the Appellant was not "entitled to possession" within the meaning of Art. 141: see *Saroda Scondari Dasi*

(1) 9 Suth. W. R. 505; S.C. B. L. R. Sup. vol. p. 1008.

(2) 9 Moore's Ind. Ap. Ca. 539.

(3) Ind. L. R. 9 Calc. 934.

v. *Doyamoyi Dasi* (1); *Pertab Narain Singh* v. *Triloki Nath Singh* (2). The High Court, instead of reluctantly following the Full Bench ruling in 9 Calc. 934, should have held that it was not applicable to this case, which was barred by limitation in accordance with the ruling in 5 Calc. 938. The Appellant's right was barred before the later *Limitation Act* came into force, for his title was extinguished by the decree against the female proprietor, and there was nothing in the schedule to either Act to give a new right or to cut down the effect upon his title of the former decree.

Doyne, replied.

1893
June 17.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH: —

The question in this appeal is whether the suit is barred by the law of limitation. It was brought to recover a two-thirds share of immoveable and moveable properties formerly in the possession of *Ramanundun Goswami* (*Mookerji*), to which he was said to be entitled, as to one part as marfatdar or shebait, and as to the other as malik. He died in 1847, leaving a widow, *Pearimoni*, his second wife, and five daughters, one having died in his lifetime. The eldest daughter, *Drobomoni*, died in 1867, leaving a son, *Kala Chand*, who died in the following year, leaving a son, *Girish Chunder*, who is the third Defendant. The second daughter, *Hurromoni*, died in 1874, leaving a son, *Mothoor Mohun*, the first Defendant. The third of the survivors, *Moiimoni*, died in 1857, leaving a son, *Thakoordas*, the second Defendant. The fourth died childless, and the last survivor, *Sampurna*, died on the 22nd of February, 1884, leaving a son, *Hurri Nath*, who is the Plaintiff. The plaint stated that, after the death of *Hurromoni*, *Sampurna*, who was then the only survivor of the daughters, placed the whole of the estate under the management of *Mothoor Mohun*, who some time after brought suits for rent against tenants, and, with a view of effecting registration in his own name under Act VII. of 1876 (*Bengal* Council), made peti-

(1) Ind. L. R. 5 Calc. 940. (2) Law Rep. 11 Ind. Ap. 197, 205.

J. C 1893

HURRINATH CHATTERJI v. MOHUNT MOTHOOR MOHUN GOSWAMI.

tions; that thereupon *Sampurna* became an objector, and, the objections having been disallowed, she, in 1879, brought a suit against *Mothoor Mohun in formâ pauperis*, which was dismissed on the 27th of June, 1881; that she preferred an appeal *in formâ pauperis* to the High Court; but the appeal not having been preferred within the prescribed time her application to prefer it *in formâ pauperis* was rejected, with liberty to prefer an appeal within six weeks on putting in the Court fee; that she was unable to do this, and consequently the dismissal of her suit became final. The plaint further stated, that *Thakoordas*, on a native date corresponding with the 17th of August, 1875, made to the Plaintiff a gift of his share of one-third of the estate left by *Ramanundun*, making the Plaintiff entitled to two-thirds as claimed. *Mothoor Mohun* in his written statement said that *Sampurna*, after the death of *Pearimoni*, instituted a suit for possession of all the properties under claim against him; that her claim was dismissed on the ground of limitation, it having been established that, after the death of *Pearimoni*, *Sampurna* was never in possession of the shebas and the other properties relating thereto left by *Ramanundun*.

The Subordinate Judge made a decree for possession by the Plaintiff of the immoveable properties claimed in the plaint with the exception of some specified lands, and the Plaintiff has not appealed against this exception. The Defendant *Mothoor Mohun* appealed to the High Court. In the judgment of that Court it is said that "the defence, so far as it need be referred to, is that the claim is barred by limitation, as none of *Ramanundun's* daughters inherited or were in possession; that the Plaintiff is bound by the adverse decree passed against *Sampurna* in the suit which she brought against Defendant No. 1, and that he cannot bring another suit." This defence was distinctly asserted in the written statement, and no objection appears to have been taken that it was not raised by the issues which were settled. The judgment of dismissal of the 27th of June, 1881, although it had been filed with the plaint, was not put in evidence, and cannot be looked at; but the High Court had before it the statement in the plaint which admitted that there had been that judgment, and *Mothoor Mohun* said in his

written statement that it was on the ground of limitation. There was thus sufficient evidence for the High Court to found its judgment upon.

It will be convenient here to notice the state of the law of limitation when the suit was brought in 1887. Prior to the *Limitation Act* of 1871 the law, under Act XIV. of 1859, was, that suits for the recovery of immoveable property must be brought within twelve years from the time when the cause of action arose. By the *Limitation Act* of 1871, the whole of the Act of 1859 which applied to the limitation of suits was repealed; and by the 4th section it was enacted that, subject to the provisions contained in certain sections, every suit instituted after the period of limitation prescribed therefor by the second schedule to the Act should be dismissed, although limitation had not been set up as a defence. Art. 142 in the second schedule is as follows:—

"Like suit (that is for possession of immoveable property) by a Hindú entitled to the possession of immoveable property on the death of a Hindú widow. Period of limitation—twelve years. Time when period begins to run—when the widow dies."

In 1877 this Act was repealed and the *Limitation Act* of 1877 was passed. In that Act the same period of limitation was by Art. 141 prescribed to a suit by a Hindu or Mahomedan entitled to the possession on the death of a Hindu or Mahomedan female.

In the judgment of this Committee in the *Shivagunga Case* (1) it is said (p. 604), with reference to an adverse decree in a suit brought by a Hindu widow for possession of a zemindary as heir to her husband, that if it had become final in her lifetime it would have bound those claiming the zemindary in succession to her; and unless it could be shewn that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to the widow. The judgment in *Nobin Chunder Chuckerbutty* v. *Guru Pershad Das* (2), quoted by the High Court, is not directly applicable to the present case. It is referred to in the judgment of this Committee

(1) 9 Moore's Ind. Ap. Ca. 539. (2) B. L. R. Sup. vol. p. 1008.

J. C. 1893

HURRINATH CHATTERJI v. MOHUNT MOTHOOR MOHUN GOSWAMI.

in *Aumirtolall Bose* v. *Rajoneekant Mitter* (1), where it is said that the rule there laid down had been acted upon in other cases, and it appeared to their Lordships that the principle of that decision is correct. In the latter case the suit was brought on the 8th of September, 1858, and the question of limitation had to be determined according to the old law.

The estate to which *Sampurna*, as the survivor of the daughters, succeeded, was similar to the estate of a widow, and the principle of these decisions applies equally to it. This being the law when the Act of 1871 was passed, the contention of the learned counsel for the Appellant was that the effect of Art. 142 in the schedule to that Act, and of Art. 141 in the schedule to the Act of 1877, is that a decree founded upon the law of limitation is now excepted from the rule laid down in the *Shivagunga Case* (2), and that therefore the decree of 1881 only bound *Sampurna*, and the Plaintiff had by the terms of Art. 141 a period of twelve years from her death to bring his suit. Their Lordships see no ground for this contention. The words "entitled to the possession of immoveable property" refer to the then existing law. Under that law the Plaintiff being bound by the decree against *Sampurna* would not be entitled to bring a suit for possession. The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The purpose of the 2nd schedule in each of the Acts is only to prescribe the period of limitation for the suit. That appears from the 4th section of each Act. The prescribed periods are to be applied to suits founded on the existing law, and Art. 141 cannot be construed as altering the law respecting the effect of a decree. Their Lordships approve of the judgment of the High Court where it says, "We think, therefore, that on the authorities cited the Plaintiff is bound by the decree in the previous suit, and that he cannot maintain this suit, either as regards his own one-third share or as regards the share acquired from *Thakoordas*, who is equally bound by that decree." They will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal.

(1) Law Rep. 2 Ind. Ap. 121. (2) 9 Moore's Ind. Ap. Ca. 539.

The Appellant will pay the costs of this appeal, except the Respondent's costs of the application to be allowed to lodge a certified copy of the judgment of the 27th of June, 1881, in the Privy Council Office. The Respondent will pay the Appellant's costs of that application.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondent: *T. L. Wilson & Co.*

GHASITI (UNDER GUARDIANSHIP) AND NANHI JAN . . . . . } DEFENDANTS;

AND

UMRAO JAN AND ANOTHER . . . . PLAINTIFFS.

GHASITI (UNDER GUARDIANSHIP) AND NANHI JAN . . . . . } DEFENDANTS;

AND

JAGGU AND SANNU . . . . . PLAINTIFFS.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Mahomedan Law—Customs of the Kanchans—Succession.

Held, that certain customs of the Kanchans which aim at the continuance of prostitution as a family business are contrary to Mahomedan law, immoral, and not enforceable:

Held, that a Mahomedan woman who is adopted according to one of such customs by the head of a Kanchan brothel is not thereby severed from her family; and that her property, however acquired, will at her death devolve according to Mahomedan law.

Whether she acquires by her adoption any legal rights in the property of the brothel, *quære*.

APPEALS from two decrees of the Chief Court (June 27, 1888). In the first appeal the Chief Court had affirmed a decree of the District Judge of *Delhi*; in the second it had reversed his decree.

Both suits related to the property moveable and immoveable of *Mussammat Dildara*.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

J. C.
1898
GHASITI AND NANHI JAN v. UMRAO JAN.
GHASITI AND NANHI JAN v. JAGGU AND SANNU.

The facts are stated in the judgment of their Lordships.

The District Judge found that *Mussammat Bando Jan* had been adopted by *Mussammat Dildara*, and as such adopted daughter succeeded to her property; and that according to the custom as proved, she, as the result of such adoption and by the consequent severance from the family brothel to which she belonged, would have ceased to be a member of her natural family, but that the custom was bad for immorality and should not be enforced. He held that the Plaintiffs in the first suit were not heirs according to Mahomedan law to *Dildara*, but that *Bando Jan* was the root of descent, and that as she and her brothers and sisters had been born in lawful wedlock under the Mahomedan law, the latter were her legal heirs by that law, and the two female Plaintiffs were entitled to one-eighth each. He disallowed the claim put forward according to the alleged custom, under which brothers and sisters took equal shares.

The material portion of the judgment of the Chief Court is as follows:—

"The parties being Mahomedans, if no valid custom is established, the rule of Mahomedans as to inheritance must prevail under sect. 5 (*b*) of the *Punjab Laws Act*, 1872.

"It will be convenient to state, first, the conclusions which I draw from the evidence, upon which I may observe that the District Judge has, as is usual with him, recorded a very clear and painstaking judgment. It appears that among the Kanchans, and other tribes of the prostitute class, the brothel is an institution. Persons associate together as members of the institution, and sometimes, but not always, these persons are members of one family by birth. There may be male as well as female members of the institution, but the income consists principally, if not solely, of the earnings of the female members. The institution is managed by a head, almost invariably a female, who administers the property of the institution. No partner has any definite share in the property of the institution. A person who leaves the institution is not allowed to take any share. She only takes her articles of clothing. This happens when a female member so far disgraces herself as to marry or enters another brothel. She leaves, and there is one member the less. Death

of a member whether the head or another, does not affect the institution.

"If the head dies, a successor is appointed in her place. The removal of a member by death only reduces the number of members. There is in fact no inheritance properly so called. The property of the institution remains for the survivors. The body of members is augmented by what is called adoption. A girl is brought in as the adopted daughter of a female member of the institution. The object clearly is merely to keep the institution going, or, as some of the witnesses express it, 'to keep the lamp burning.' A girl who is thus adopted is regarded as having ceased to belong to her own family.

"It is clear that the object of association is to carry on the business of prostitution by the female members, for all to live upon the profits. For this purpose, also, the members are recruited from outside, by the practice called adoption, which extends only to the introduction of females. The object is the true bond of union between the members for the time being.

"I think it is clear that there is no such thing as inheritance, and that the so-called custom of adoption gives her no right in the nature of a right of inheritance. Partition of property upon death of a member of the association is practically unknown. The institution survives for the benefit of the surviving members notwithstanding the death of one of them, the personal interest of that member being extinguished by death.

"The case now before us is that of a prostitute who does not appear to have been a member of any institution of the kind described at the time of her death, unless it be the fact that there was such an institution of which she, *Mussammat Bando Jan*, and the girl *Mussammat Ghasiti* were members, and the latter was the adopted associate of the former as the head of the institution.

"Upon the evidence I do not think there was any such institution, or that *Mussammat Ghasiti* had been adopted by *Mussammat Bando Jan*. *Mussammat Bando Jan*, without doubt, joined the institution of which *Mussammat Dildara* was the head, and on her death succeeded as head of the institution. There was then another prostitute in the institution, *Mussammat Nanni*, who died before *Massammat Bando Jan*, leaving a son. It does

J. C. 1893

GHASITI AND NANHI JAN v. UMRAO JAN.

GHASITI AND NANHI JAN v. JAGGU AND SANNU.

not appear that the boy was a member of the institution, though there is evidence that he lived with *Mussammat Bando Jan*. *Mussammat Bando Jan* also acquired property herself after she entered *Mussammat Dildara's* brothel. But it does not appear that there was any institution in the latter days of *Mussammat Bando Jan*, at any rate as a going concern; she appears to have, so to speak, retired from business with an adequate fortune. The evidence as to the fact of the adoption of *Mussammat Ghasiti* is most unsatisfactory, and is of no value in face of the fact that the title by adoption was not at once advanced on the death of *Mussammat Bando Jan*. There is also some force in the argument that *Mussammat Nanni Jan* was not likely to part with her only surviving daughter.

"Further, I think good reasons are given for rejecting the will as not proved. This also was not produced at the first opportunity, and the circumstance is not satisfactorily explained.

"I concur with the Lower Courts that the facts of adoption and the *factum* of the will are not proved. It is not, therefore, necessary to express an opinion as to the legal effect of either as a title; but I may say that the adoption and the will do not necessarily stand or fall together. *Mussammat Bando Jan* as a Mahomedan had power to bequeath her property subject to the rules of Mahomedan law as to bequests, and I am not prepared to say that property duly bequeathed would not vest in the legatee merely because the intention of the testator was to further prostitution. Whether the so-called adoption of a girl by a prostitute at the head of a brothel gives that girl any legal rights in the property of the institution of which she becomes a member is a point on which I purposely express no opinion.

"The first two points for decision are accordingly found against the Defendants *Mussammat Nanni Jan* and *Mussammat Ghasiti*. As to the custom of inheritance, there is none applicable. It is clear that *Mussammat Bando Jan* left the family brothel of *Ali Bakhsh*, and no question arises as to succession to *Mussammat Bando Jan* as a member of that institution. She was the last survivor of the brothel of which she became a member under *Mussammat Dildara*, and no question arises of succession to her as a member of that brothel.

"We have left simply the case of a Mahomedan female who was a prostitute and had a fortune, the sources of which are not material, and who has died, leaving the fortune and brothers and sisters of legitimate birth surviving her.

"If no custom of inheritance be proved, the Mahomedan law must prevail. No similar case has occurred before. The natural blood relationship between *Mussammat Bando Jan* and her brothers and sisters is not extinguished by the fact that during her life *Mussammat Bando Jan* left her own family brothel for another, and there is no competition here as to inheritance between her natural heirs and any surviving member of the brothel which she joined.

"Accordingly, I think the District Judge rightly held that the brothers and sisters of the deceased are her heirs, and are entitled by Mahomedan law, the brothers each to one-fourth and the sisters to one-eight of the estate of the deceased.

Cowie, Q.C., and *C. W. Arathoon*, for the Appellants, contended that effect should have been given to the special usages or custom of succession amongst the Kanchans, as established by the evidence. For a recognition of customs similar to those sought to be established in this case, see *Mathura Naikin* v. *Esu Naikin* (1) The Courts assumed that Mahomedan law was applicable, and gave the male Plaintiffs double shares. According to the evidence, the parties were originally Hindus, and retained many Hindu customs. The parties had not retained their allegiance to Mahomedan law, which law knows nothing of adoption as practised in this case. Hindu law also knows nothing of the adoption of a woman by a woman. If the parties had no personal law of their own, and were not governed by any customs which the law would recognise, their succession *inter se* would be regulated by the *Indian Succession Act* of 1865. It was contended that the Plaintiffs had not shewn any right to the decrees which they had obtained, and that the double shares awarded to the male Plaintiffs could only be based on the provisions of Mahomedan law, which ought not to be applied.

(1) Ind. L. R. 4 Bomb. 545.

J. C.

1893

GHASITI AND NANHI JAN v. UMRAO JAN.

GHASITI AND NANHI JAN v. JAGGU AND SANNU.

The Respondents did not appear.

1893. July 22. The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

These suits relate to the inheritance of a woman named *Bando Jan*, who died in August, 1879, leaving a substantial property. Her father, *Ali Bakhsh*, and his children professed the Mahomedan religion. She had no issue, and she survived her parents. Her heirs, according to Mahomedan law, were her two brothers, *Jaggu* and *Sannu*, who are Respondents in the second appeal, and her four sisters, *Amir Jan* (now represented by *Umrao Jan*) and *Ilahi Jan*, who are Respondents in the first appeal, *Nanhi Jan*, who is one of the Appellants in both appeals, and *Banno Jan*; and as between them the inheritance would be divided into eight shares, each brother taking two shares and each sister one.

Banno brought a suit and obtained a decree in February, 1880, for one-eighth share; and she is no party to the present litigation.

In the year 1882 the two brothers, *Jaggu* and *Sannu*, the two sisters, *Amir* and *Ilahi*, and a woman called *Imaman*, sued the remaining sister, *Nanhi*, who had got into possession of the property. They alleged that, *Banno* being satisfied, the remaining property was divisible into six shares, of which *Nanhi* was entitled to one, and each of the five Plaintiffs to one. They made out their claim as follows. All the parties to the dispute belong to the people (in the translated plaint it is called the tribe) of Kanchans. In that tribe the business of brothel-keeping and prostitution is carried on by families or communities who are recruited by adoption. *Bando* left her own family to be adopted by one *Dildara*, who was the head of another establishment of the same kind. She succeeded to *Dildara's* property; and as *Dildara* was dead, and her brothel had ceased to have any members except *Bando* herself, on *Bando's* death her estate was distributable according to the custom of the Kanchans, which, it was alleged, would carry it to the family heirs of *Bando*, and to *Imaman*, the sister of *Dildara*, in equal shares. It is obvious

that such a claim is full of difficulty and apparent inconsistencies in itself, but it was made.

After a while the brothers reconsidered their position. They determined to assert a claim under the common law of Mahomedans, by which they would take larger shares than under the custom of Kanchans. Thus their interests became adverse to those of their sisters, and they could no longer be co-Plaintiffs. They procured orders under which they were made Defendants instead of Plaintiffs. And they instituted a suit of their own to enforce their claim against their three sisters. That is the second suit in which an appeal is brought. These matters of procedure have no importance except for the reason that the institution of the brothers' suit is objected to as irregular. The Chief Court has held it to be regular, and their Lordships have declined to hear the appeal on this point argued. The decree complained of can be made as properly in the suit where the brothers are Defendants as in that where they are Plaintiffs, and the objection is based on a technicality without any practical bearing.

The substantial defences of *Nanhi* were, first, that *Ghasiti* was the adopted daughter, and also the legatee of *Bando*; and, secondly, that as *Bando* had been adopted by *Dildara*, no right of inheritance could devolve on the Plaintiffs either by Mahomedan law or by custom. The allegations respecting *Ghasiti* were negatived by both Courts; so that the only questions which remained for them were whether the Plaintiffs could claim any inheritance, and if so in what shares. *Imaman* was discharged from the suit, and died before the hearing. The contest, therefore, was between the two sisters claiming customary shares, the two brothers claiming shares by common law, and the third sister contending that none of her father's family had any claim at all.

It is quite clear that there was no adoption under any general Indian law. Adoption is not known to the general law of Mahomedans, and adoption of girls is not known to the general law of Hindus. If there was adoption, it could only have been under some local, tribal, or family custom, which must be proved by those who allege it. Accordingly a great deal of evidence was given to prove the customs of the Kanchans. The two

J. C. 1893

GHASITI AND NANHI JAN v. UMRAO JAN.

GHASITI AND NANHI JAN v. JAGGU AND SANNU.

Courts are in accord as to the result, a portion of which their Lordships will now re-state.

It appears that each family or community live a cœnobitical, quasi-corporate life in what the learned Judges call the family brothels. All the members, including males, are entitled to food and raiment from the business, the males living a life of idleness at the expense of the females. There is no such thing as separate or individual succession upon death. All the members succeed jointly. No division or partition is allowed, for that would break up the establishments, and the witnesses say that the lamp should be kept burning in the house. A member of a family brothel who leaves it does so with only her clothes on her back and nothing more. The body is recruited by adoption. A girl is brought in as the adopted daughter of a female member of the institution, and the girl thus adopted is regarded as having ceased to belong to her own family.

That *Bando* was adopted by *Dildara* according to the custom there seems to be no doubt, if indeed there was any dispute. Whether she thereby acquired a right of inheritance according to the custom is a question which does not arise in this suit. She joined *Dildara's* establishment, and on *Dildara's* death became its head, took the property there, and increased it by her own earnings. But the suit relates entirely to the succession from *Bando*; it raises no question as to the succession from *Dildara* to *Bando*, nor has anybody made any claim adverse to *Bando* in respect of property belonging to *Dildara*, or in respect of any property possessed by *Bando* at her death. The question is how that property is to devolve, and how *Bando* got it is immaterial.

The two Plaintiff sisters contend that *Bando* held the property as head of the brothel into which she had been adopted. By what process they claim that it passed to them and the other Plaintiffs is, as above intimated, not easy to understand. The Defendant sister is more logical. Agreeing that *Bando* was adopted by *Dildara*, she says that the adoption severed *Bando* completely from her own natural family. That certainly is the effect of adoption by Hindu law, and the evidence shews that it is the same according to Kanchan custom. A distinct issue on the point was settled and decided by the First Court.

On this issue the District Judge found as follows: "Upon the custom as above stated no question can arise as to *Mussammat Bando Jan* having ceased to be a member of her natural family by being adopted by *Mussammat Dildara*. The adoption (if proved) really was for the purpose of succession to *Dildara's* family brothel, and in this way *Mussammat Bando Jan* ceased to be a member of the brothel of her natural family, and ceased to have any claim therein." But he stated his view of the law to be that all these rules and customs of the Kanchans aim at the continuance of prostitution as a family business, that they have a distinctly immoral tendency, and should not be enforced in Courts of Justice. He therefore held that the whole transaction was null and void, that there was no severance of *Bando* from her family, and that her property must be distributed according to Mahomedan law.

The Chief Court expressly abstain from pronouncing any opinion on the question whether the adoption of a girl by a prostitute at the head of a brothel gives that girl any legal rights in the property of the institution. They sum up the case thus: "As to the custom of inheritance, there is none applicable. It is clear that *Mussammat Bando Jan* left the family brothel of *Ali Bakhsh*, and no question arises as to succession to *Mussammat Bando Jan* as a member of that institution. She was the last survivor of the brothel of which she became a member under *Mussammat Dildara*, and no question arises of succession to her as a member of that brothel."

Their Lordships are disposed to think that is a sound conclusion; and if so, it would suffice to settle the controversy between the Plaintiff sisters and their brothers. But it does not cover the whole ground. If the custom is valid, what answer is there to the Defendant sister's contention that *Bando's* natural family could not inherit from her after her adoption by *Dildara*?

Their Lordships have no hesitation in affirming the law as laid down by the District Judge. In the case of Hindus there are stronger grounds for maintaining that practices of prostitution are related to worship in the temples, and meet with countenance from the law. But even in the case of Hindus great difficulties have been felt by Courts of Justice in admitting the validity of

J. C. 1893

GHASITI AND NANHI JAN v. UMRAO JAN.

GHASITI AND NANHI JAN v. JAGGU AND SANNU.

transactions intended for the furtherance of prostitution. See the case of *Mathura Naikin* v. *Esu Naikin* (1), and the authorities there referred to. And as regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws.

Mr. *Baillie's* valuable Digest of Mahomedan Law opens thus: "The intercourse of a man with a woman who is neither his wife nor his slave is unlawful, and prohibited absolutely. When there is neither the reality nor the semblance of either of these relations between the parties, their intercourse is termed zina, and subjects them both to hudd, or a specific punishment for violating the laws of Almighty God." The statement is quite justified by the authority of the Hedaya, Lib. VII., c. 1, 2, and 3, according to which the practice of zina is held up to reprobation, and is punishable in ways which would now be considered as savage and cruel. Indeed, the most venerable of all authorities, the Koran itself, though not going so much into detail as the Hedaya, forbids harlotry under severe penalties, see caps. 4 and 24 of *Sale's* Translation. It seems to their Lordships impossible to say that such customs as are proved in this case to exist among the Kanchans are not contrary to the policy of the great religious community to which the Courts have found that all the parties belong.

A minor point in the case relates to certain moveable property which appears to have been stolen after the commencement of litigation by *Banno*. The Courts below have concurred in thinking that *Nanhi* had the property in her possession, and therefore is responsible for the loss, and their Lordships consider that it would not be proper to disturb concurrent decisions on such a point. The result is that both appeals should be dismissed, and their Lordships will humbly advise Her Majesty to this effect.

Solicitors for the Appellants: *T. L. Wilson & Co.*

(1) Ind. L. R. 4 Bomb. 545.

END OF VOL. XX.

INDEX.

ACCUMULATIONS: *See* HINDU LAW. 1.

ACT XI. OF 1859, sects. 17, 33: *See* SALE FOR ARREARS OF REVENUE.

ACT IX. OF 1871, Art. 142: *See* LIMITATION. 2.

—— **Art. 129**: *See* HINDU LAW. 2.

ACT XV. OF 1877: *See* LIMITATION. 1, 3.

ACT XIV. OF 1882, sect. 43: *See* LIMITATION. 3.

BENAMEE PURCHASES.] Where a benameedar purchased property with moneys borrowed from the Appellant, and afterwards mortgaged the purchased property to the Appellant to secure the debt, the Appellant being aware of the benamee character of the title, and the real purchaser being cognizant of the mortgage:—*Held*, in a suit against the benameedar and the beneficial owner, that even if the mortgagor had not created a valid hypothecation of the property, still the Appellant was entitled in equity to a declaration that the sums advanced with interest were a charge thereon. SARJU PARSHAD *v.* BIR BHADDAR SEWAK PANDAY - - - - 108

BENGAL ACT (VIII. OF 1869), sects. 46, 31.] In a suit brought for rent at an enhanced rate more than six months after notice of a deposit of rent in Court under sect. 46 of *Bengal Act* VIII. of 1869, it appeared that the deposit had been made before the rent had accrued due:—*Held*, that such suit was not barred by sect. 31. RAJA SURJA KANT ACHARYA *v.* RANI HEMANTA KUMARI DUBI [25

CERTIFICATE AND NOTICE: *See* PUBLIC DEMANDS RECOVERY ACT (VII. OF 1880.)

CIVIL PROCEDURE CODE, sect. 435.] Where a branch bank was carried on by a manager holding a power of attorney under the seal of the company, and such manager had in his absence delegated, in pursuance of such power, all his authority to an accountant, but such substituted power omitted words giving power to sue:—*Held*, that such substitute had as acting manager authority under sect. 435 of the Civil Procedure Code to sign and verify a plaint by the company, being a "principal officer of the corporation" within the meaning of that section. DELHI AND LONDON BANK *v.* OLDHAM AND OTHERS - 139

—— **sects. 289, 290, 311**: *See* EXECUTION SALE.

COLLECTOR'S ATTACHMENT FOR ROAD CESS: *See* SALE FOR ARREARS OF REVENUE.

CONCURRENT FINDINGS OF FACT.] Where there were concurrent findings of fact that a purchase by a Mahomedan in the name of his sons was for their benefit, and that beneficial enjoyment by the sons had been proved, and destroyed the presumption of benami, *held* that such findings would not be questioned by the Committee.—A Mahomedan having directed property to be transferred from a benamidar to his wife, the first Court found that he did so intending the latter to hold for her own benefit, while the High Court found that the wife was to hold in the first instance as substituted benamidar, and subsequently for her own benefit, the findings as to possession by the transferee before the death of the donor being concurrent:—*Held*, that this was not sufficient concurrence to prevent further inquiry, and that on the evidence the view of the first Court was to be preferred. SYED ASHGAR REZA *v.* SYED MEDHI HOSSEIN KHAN - - 38

—— *See* PRACTICE. 2.

CONSTRUCTION.] Where the holder of an impartible raj compromised family disputes by agreeing with the eldest son of his younger brother to give "you every month Rs.300 on account of the maintenance of yourself, your younger brothers, three in all, and the rest of your family":—*Held*, in a suit by the son of the youngest of the three brothers against the son of the rajah, that such payment was not limited to the life of any one brother or of all three, but that the "rest of your family" included the issue of the three brothers, and that a decree in the Plaintiff's favour for maintenance was right. SRI SRI SRI LAKSHMI NARAYANA ANANGA GARU *v.* SRI MADHAWA DEO GARU - - - 9

CO-PARCENER CANNOT MORTGAGE HIS SHARE: *See* HINDU LAW. 3.

CUSTOMS OF THE KANCHANS: *See* MAHOMEDAN LAW. 2.

DECREE AGAINST HINDU DAUGHTER: *See* LIMITATION. 1.

DHURMAKARTAH: *See* RELIGIOUS FOUNDATION.

DISBURSEMENTS FOR GOVERNMENT REVENUE: *See* EJECTMENT.

DOWER: *See* MAHOMEDAN LAW. 1.

EJECTMENT.] Where the Appellant, being in possession of revenue-paying land under a decree of the High Court, in good faith paid the revenue, failed through no fault of his own to reimburse himself out of the rents, and was afterwards

EJECTMENT—*continued.*
ejected by the Respondents, who had obtained from the Privy Council a reversal of the said decree:—*Held*, that he was entitled to recover the balance of such payments over receipts.—*Quære*, whether he would not have been so entitled had his possession been wrongful.—*Peruvian Guano Company* v. *Dreyfus Brothers* ([1892] A. C. 166) referred to. DAKSHINA MOHUN ROY CHOWDHRY *v.* SARODA MOHUN ROY CHOWDHRY - 160

EQUITABLE RIGHTS OF PURCHASER: *See* BENAMEE PURCHASER.

EXECUTION SALE.] Sect. 289 of the Civil Procedure Code provides that a copy of a proclamation of sale shall be fixed up in the Court-house after it has been posted in the villages, and, consequently, sect. 290 is not complied with unless the thirty days mentioned therein have elapsed since both fixing and posting have taken place. Such non-compliance is material irregularity within the meaning of sect. 311; but a sale in disregard of sect. 290 is not a nullity, and will not be set aside unless direct evidence of substantial injury resulting from the irregularity has been given. TASSADAK RASUL KHAN *v.* AHMAD HASAIN - - - - - 176

EXPROPRIATION OF TEMPLES: *See* LAND ACQUISITION ACT (X. OF 1870).

GRANTS BY TREATY.] *Held*, with regard to both the saranjam and inam tenures in suit, that having been originally granted by treaty to be held on a political tenure, they had continued to be so held, with the result that they were resumable at the pleasure of the Government. Such right of resumption had been recognized by legislation (see *Bombay Act* VII. of 1863). It accordingly rested with the Government to regrant the same at its discretion on the death of their holder, and it was not within the competency of any legal tribunal to review its decision. SHEIKH SULTAN SANI *v.* SHEKH AJMODIN - 50

HINDU LAW.] Where a sonless Hindu widow received from the executor of her husband's will a fund representing the accumulated income of his estate for eight years after his death, and undisposed of by the will, claiming the same as her absolute property, and the executor, who was also reversionary heir to the deceased, assented to her so receiving it, and admitted her absolute interest:—*Held*, that the fund passed to the Respondent under a deed of trust in his favour executed by the widow. SOWDAMINEE DOSSEE *v.* ADMINISTRATOR-GENERAL OF BENGAL - 12

2. —— According to Hindu law a valid second adoption cannot be made when a son under a previous adoption is alive.—*Rungama* v. *Atchama* (4 Moore's Ind. Ap. Ca. 1).—*Held*, that this suit, having been brought to recover possession on the ground that the Defendant's adoption was invalid, was a suit to "set aside an adoption" within the meaning of the *Limitation Act* of 1871.—*Jagadamba Chowdhrani and Others* v. *Dakhina Mohun and Others* (Law Rep. 13 Ind. Ap. 84) followed.—Consequently, twelve years having elapsed from the date of adoption before the Act was passed, the suit, which was not instituted till after April 1, 1873, when the Act came into force, was barred by art. 129, Sched. 2. MOHESH NARAIN MOONSHI *v.* TARUCK NATH MOITRA - - - 30

3. —— It is the settled law of the Mitakshara, as administered in *Bengal* and the North-West Provinces, that a Hindu cannot, without the consent of his coparceners, sell or mortgage his undivided share in the ancestral estate for his own benefit.—Where a son had mortgaged his half-share, and his father had *bonâ fide* without notice of the mortgage purchased portions of the mortgaged property at sales in execution of decrees against the son, *held* that the son's coparcenary interest therein passed to the purchaser, and that the only remedy of the mortgagee was to attach and sell any unsold portion of the mortgaged property in execution of a money decree against the mortgagor. BALGOBIND DAS *v.* NARAIN LAL - - - - 116

INDIAN PENAL CODE, sect. 511: *See* PRACTICE. 1.

INJUNCTION AGAINST TRESPASSER.] In a suit for a declaration that the Plaintiff was absolute owner of the land in suit and for an injunction, the defence was that the land was subject to a wakf created by the Plaintiff's predecessor in title, and that the Defendant was mutwali thereof. Both Courts found in favour of the Plaintiff's possession, and that the Defendant was not the mutwali nor possessed of any interest in the land, but differed as to the dedication:—*Held*, that the Plaintiff was entitled to a declaration as against the Defendant that he was lawfully entitled to possession and the relief consequent thereon. It was unnecessary to decide as to the validity of the wakf for the purposes of the suit or in the absence of the parties interested. ISMAIL ARIFF *v.* MAHOMED GHOUSE 99

LAND ACQUISITION ACT (X. OF 1870).] In assessing the market value of land taken under the *Land Acquisition Act* (X. of 1870), *held* (1.) that twenty-five years' purchase at a rent fairly estimated ought not to be reduced in appeal to fifteen years' purchase at a rent paid for a part without reason assigned; (2.) that the Appellate Court was wrong in giving to the zemindar compensation for the loss of earnings by those employed on the land, they not being interested in the land, and the zemindar not being interested in their earnings or the loss of them. Under sect. 42, fifteen per cent. on the sum awarded must be paid if the award has omitted that addition. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SHANMUGARAYA MUDALIAR - - 80

LAW OF CHAMPERTY.] The English law of champerty is not in force in *India*, and agreements to share the subject of litigation, if recovered, are not in themselves opposed to public policy. But when such agreements are extortionate and inequitable effect should not be given to them, although compensation for legitimate expenses may properly be awarded. KUNWAR RAM LAL *v.* NIL KANTH - - - 112

LAW OF CHAMPERTY —*continued.*

2. —— Where the Plaintiffs had, in the belief that the Defendant's claim to an estate was well founded, advanced the funds necessary to enable him to prosecute a successful appeal to the Privy Council, and the High Court held that the reward stipulated for was in the circumstances excessive and unconscionable, and gave a decree for the amount of moneys actually advanced with interest thereon:—*Held*, that such a decree would not be reversed unless shown to be clearly wrong.—*Ramcoomar Coondoo* v. *Chunder Canto Mookerjee* (Law Rep. 4 Ind. Ap. 47), followed. RAJAH MOKHAM SINGH *v.* RAJAH RUP SINGH - - - - - - - 127

LEAVE TO APPEAL IN CRIMINAL CASE REFUSED: *See* PRACTICE. 1.

LIMITATION.] To a suit by one of three reversionary heirs against another to recover possession of two shares of the estate, the Defendant pleaded that he had been sued in respect of the whole estate by the daughter of the last full proprietor (while she represented that estate), and that, a final judgment having been given in his favour, the Plaintiff was bound thereby in respect of his title to both shares claimed:—*Held*, that this plea was correct, and that the Plaintiff was not entitled to the shares in suit within the meaning of Art. 141 of the 2nd schedule of the *Limitation Act* of 1877, or Art. 142 of the Act of 1871, so as to possess a cause of action in respect thereof on the daughter's death —The rule in the *Shivagunga Case* (9 Moore's Ind. Ap. Ca. 539), to the effect that an adverse decree against a Hindu widow binds those claiming in succession, applies equally to the case of the daughter. HURRINATH CHATTERJI *v.* MOHUNT MOTHOOR MOHUN GOSWAMI - - - - - - - 183

2. —— It being proved that the Defendant had, twenty years before suit, combined with an insolvent and others to conceal the property of the insolvent, with a view of defrauding his creditors, and in pursuance of the fraud had become possessed of assets belonging to the insolvent estate:—*Held*, in a suit by the official assignee to recover the same, that in order to bar the suit the *onus* was on the Defendant to shew the Plaintiff's clear and definite knowledge of the facts constituting the fraud at a date beyond the statutable period.—Such *onus* is not discharged by showing that some hints and clues had reached the Plaintiff which might have led to such knowledge, the Defendant being all the while in possession of the insolvent's books and preventing the Plaintiff from seeing accounts which he desired to see.—A decree of the first Court directing a general account of the dealings between the Defendant and the insolvent after the date of the insolvency affirmed without the variations subsequently made. RAHIMBHOY HUBIBHOY *v.* TURNER - - - - - 1

3. —— A suit by a Mahomedan widow for dower is distinct from her suit to recover the whole or a portion of her husband's estate as heiress, and a final decree disposing of the former does not bar the latter under sect. 43 of Act XIV. of 1882.—Art. 120 of the *Limitation Act* applies to a suit to recover as heiress the moveable estate of the deceased. Such a suit is not for a distributive share of property as in Art. 123, or for specific moveable property wrongfully taken as in Art. 49, and is not within any other article of the schedule to that Act. MAHOMED RIASAT ALI *v.* MUSSUMAT HASIN BANU - - - - - - 155

—— *See* HINDU LAW. 2.

—— *See* BENGAL ACT VIII. OF 1869.

MAHOMEDAN LAW.] Where the amount of dower allowed by the First Court as reasonable under the *Oudh Laws Act*, 1876, in a suit by the wife to enforce an excessive stipulated amount, had been altered by the Judicial Commissioners; their Lordships, though reluctant to overrule the exercise of a discretionary jurisdiction, examined the grounds on which the alteration was made, and restored the decree of the First Court. PRINCE MIRZA SULEMAN KADR *v.* NAWAB MEHDI BEGAM SURREYA BAHU - - - - 144

2. —— *Held*, that certain customs of the Kanchans which aim at the continuance of prostitution as a family business are contrary to Mahomedan law, immoral, and not enforceable:—*Held*, that a Mahomedan woman who is adopted according to one of such customs by the head of a Kanchan brothel is not thereby severed from her family; and that her property, however acquired, will at her death devolve according to Mahomedan law.—Whether she acquires by her adoption any legal rights in the property of the brothel, *quære*. GHASITI *v.* UMRAO JAN - 193

MATERIAL IRREGULARITY: *See* EXECUTION SALE.

MITAKSHARA: *See* HINDU LAW. 3.

OUDH ESTATES ACT, 1869.] Where an estate is placed in class 2 and not in class 3 of Act I. of 1869 it descends to a single heir, not necessarily by the rule of lineal primogeniture. Degree prevails over line in the ascertainment of such heir, but where the degree is equal line prevails.—Sect. 22, sub-sect. 11, in referring the parties to the law which would govern the descent of property when the special provisions of the Act are exhausted, includes family custom in such law. NARINDAR BAHADUR SINGH *v.* ACHAL RAM - 77

OUDH LAWS ACT, 1876: *See* MAHOMEDAN LAW. 1

POLITICAL TENURE: *See* GRANTS BY TREATY.

PRACTICE.] Although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection by a Judge, either in leaving a case to a jury where there is no evidence or founded on an incorrect construction of the Penal Code, even if established, is insufficient for that purpose, especially where no miscarriage of justice has resulted. *Ex parte* MACREA - - - - - - 90

2. —— In a suit for an account against a mokhtar and cashier, it appeared that the Plaintiff had executed a deed of release on the 22nd of April, 1884, founded on an alleged adjustment of accounts, and that on the 8th of May, 1885, the Defendant had signed a document stating that

PRACTICE—*continued.*
there had been no such adjustment, and that he was willing to account which document he had unsuccessfully sued to set aside:—*Held*, that concurrent findings of fact to the effect that the release was a genuine document, that it had been preceded by a detailed examination of accounts made on behalf of the Plaintiff, and that the Defendant had used no unfair means to obtain it, disposed inferentially of the document of the 8th of May, 1885, and was fatal to the suit. RAJAH NILMONI SINGH *v.* KIRTI CHUNDER CHOWDHRY 95

—— *See* CONCURRENT FINDINGS OF FACT.

PROCEDURE TO SET ASIDE SALE: *See* SALE FOR ARREARS OF REVENUE.

PUBLIC DEMANDS RECOVERY ACT (VII. OF 1880, Beng. C.).] In a suit by the Respondent to cancel a certificate issued under Act VII. of 1880 (Beng. C.), and an auction sale of his villages in execution of that certificate, and for confirmation of proprietary right, it appeared that the certificate, though in statutory form, was in a tattered condition, wanting the Collector's signature, and erroneously set forth as debtors two out of the three former proprietors; that the notice thereunder, if served, was addressed in the same way; that the execution sale purported to pass to the Appellant the interest of the three former proprietors; that no certificate of purchase was produced or evidence given of price paid:—*Held*, that such proceedings could not affect the Respondent's proprietary right, and that his suit must be decreed.—The procedure to be observed by the road cess authorities explained. MAHOMED ABDOOL HAI *v.* GUJRAJ SAHAI - - 70

RELIGIOUS FOUNDATION.] Where it was proved that the established usage of a religious foundation was that each dhurmakartah appointed whilst in office and shortly before his death as his successor an ascetic previously initiated by him:—*Held*, that the Appellant having been appointed not in good faith by a person who had ceased to be dhurmakartah, having been removed from his office by the Court for embezzlement, and being at the time subject to a charge of criminal breach of trust, was not the lawful dhurmakartah. RAMALINGAM PILLAI *v.* VYTHILINGAM PILLAI - - - 150

REMEDIES OF MORTGAGOR OF UNDIVIDED SHARE: *See* HINDU LAW. 3

RES JUDICATA: *See* LIMITATION. 1.

RIGHT OF EJECTED TENANT TO RECOVER NECESSARY DISBURSEMENTS. *See* EJECTMENT.

SALE FOR ARREARS OF REVENUE.] A purchaser at a sale in execution of a decree obtained by a first mortgagee in a suit to which puisne incumbrancers are not parties does not displace the latter, but stands in the position of first mortgagee.—A Government sale for arrears of revenue is contrary to sect. 17 of Act XI. of 1859 if made for arrears which have accrued while the land was subject to an order issued by the Collector under the *Cess Act*, 1880, for levy of road cess in arrears. Such order is an attachment within the meaning of sect. 17.—But sect. 33 bars a suit to set aside such sale except on grounds "declared and specified" in a previous appeal made to the Commissioner under sect. 25. That section applies not merely to cases where the sale has been irregularly conducted, but also where the sale has been illegal in consequence of some express provision for exemption having been directly contravened.—*Lala Gowri Sunker Lal* v *Janki Pershad* (Law Rep. 17 Ind. Ap. 57) followed. RAJAH GOBIND LAL ROY *v.* RAMJANAM MISSER - 165

SARANJAM AND INAM TENURES: *See* GRANTS BY TREATY.

SECOND ADOPTION: *See* HINDU LAW. 2.

SUCCESSION: *See* MAHOMEDAN LAW. 2.

—— *See* RELIGIOUS FOUNDATION.

SUIT TO SET ASIDE ADOPTION: *See* HINDU LAW. 2.

TALUKS DESCENDIBLE TO A SINGLE HEIR: *See* OUDH ESTATES ACT, 1869

UNCONSCIONABLE BARGAIN: *See* LAW OF CHAMPERTY.

WAKF: *See* INJUNCTION AGAINST TRESPASSER.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET, AND CHARING CROSS.